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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THOMAS R. ISRAEL and
BRONSON C. LA FOLLETTE
Petitioners,

vs

DARREL McMORRIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DARREL McMORRIS,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari be issued to review the opinion of the Court of Appeals for the Seventh Circuit in the litigation here in question.

QUESTION

Whether a rule, judicially created by the highest court of a state, requiring the prosecution and the defense in a criminal proceeding to enter into a valid stipulation as a precondition to the admission of polygraph testimony by either party at trial deprives a defendant of the due process of law.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals, reversing the order of the Federal District Court for the Eastern District of Wisconsin which denied habeas corpus relief, was filed on March 9, 1981, and is reported at 643 F.2d 458 (7th Cir. 1981). A reproduction of the opinion is printed in the Appendix (App. 1a-17a). A timely Petition for Rehearing *En Banc* was filed in the Seventh Circuit Court of Appeals. On May 11, 1981, an Order was entered modifying certain language in one footnote, inserting a recent citation, and denying the petition. Four (4) of the eight (8) circuit judges — "less than a majority of the active members" — did vote to grant the Petition for Rehearing *En Banc*. A reproduction of the Order is also printed in the Appendix (App. 18a-21a).

The Federal District Court for the Eastern District of Wisconsin, the Honorable Robert W. Warren, District Judge, presiding, issued an opinion on August 28, 1979, denying respondent's petition for writ of habeas corpus. The unreported opinion is reproduced in the Appendix (App. 21a-26a). Respondent filed a motion for reconsideration in the district court. On March 20, 1980, a Memorandum Opinion and Order were filed denying the motion for reconsideration. The unreported Memorandum Opinion and Order are also reproduced in the Appendix (App. 27a-32a).

Prior to seeking habeas corpus relief, the respondent appealed his conviction to the Supreme Court of the State of Wisconsin. The unreported *per curiam* opinion affirming the respondent's conviction is reproduced in the Appendix (App. 33a-34a).

JURISDICTIONAL STATEMENT

The denial of the Motion for Rehearing *En Banc* of the opinion of the Seventh Circuit Court of Appeals

was entered on May 7, 1981. This petition for a writ of certiorari is filed within ninety days of that date pursuant to 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 2241(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Article VI of Amendments:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article XIV of Amendments:

> Section 1. *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Darrel McMorris, hereinafter referred to as respondent, was convicted in a Wisconsin state court following a jury trial of strong-armed robbery, contrary to sec. 943.32(1) (a), Wisconsin Statutes.

The factual circumstances of the crime are recounted in the opinion of the Seventh Circuit Court of Appeals:

> At [respondent's] trial in state court, the prosecution presented only one witness, the victim, who identified the [respondent] as the person who had grabbed him from behind, taken his wallet and pushed him to the ground. On cross-examination the victim conceded that it was dark at the time of the attack and that the whole incident was over very quickly. The victim also conceded that he had never seen the defendant before and that he was unable to give a description of his assailant. The [respondent] took the stand and denied any involvement in the crime, claiming that the victim was mistaken in his identification of the [respondent] as his assailant.

McMorris, 643 F.2d at 459 (App. 1a-2a).

Prior to trial, the respondent's trial counsel contacted the prosecutor and sought to enter into a stipulation pursuant to *State v. Stanislawski*, 62 Wis. 2d 730, 216 N.W.2d 8 (1974), whereby both the defense and the prosecution would agree to the administration and admission into evidence of a polygraph examination of the respondent. The procedures regarding the admissibility of polygraph testimony established in *Stanislawski* were as follows:

> (1) That the district attorney, defendant and his counsel all sign a written stipulation

providing for defendant's submission to the test and for the subsequent admission at trial of the graphs, and the examiner's opinion thereon on behalf of either defendant or the state.

(2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial court, i.e., if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

(3) That if the graphs and examiner's opinion are offered in evidence the opening party shall have the right to cross-examine the examiner respecting:

(a) The examiner's qualifications and training;

(b) the conditions under which the test was administered;

(c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and

(d) at the discretion of the trial court, any other matters deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate whether at the time of the examination defendant was telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.

Stanislawski, 62 Wis. 2d at 742-43, 216 N.W.2d at 14. After some initial indecision, the prosecutor refused to enter into such stipulation.

Within three days of the trial, the defense renewed its offer to enter into such a stipulation, but the prosecution again rejected it.

The defendant did not, as he was later to do after trial, submit to a polygraph examination on his own and offer its results into evidence without a stipulation. Nor did he in any other way, by offer of proof, or otherwise, call the matter to the trial court's attention prior to his conviction. He never sought from the trial court either an order requiring the prosecutor to enter into a stipulation or an order abrogating the requirement of a stipulation and permitting the administration of a polygraph examination and the subsequent admission of its results into evidence even without the prosecutor's approval.

The defendant underwent a polygraph examination only after the return of the verdict of guilty when he was secure in the knowledge that the test results would neither be disclosed nor used against him should they have turned out to be unfavorable.[1]/ The favorable results of that examination were then proferred to the trial court in support of a post-trial motion for a new trial.

At the evidentiary hearing on that motion, respondent's trial counsel testified that the prosecutor had refused to stipulate to admission of polygraph evidence. Also appearing at that hearing was Theodore G. Welch, the polygraph examiner who conducted the post-conviction polygraph examination on the respondent.

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[1] The effect of such knowledge on the reliability of the polygraph test results was discussed in the opinion of the Seventh Circuit Court of Appeals. *McMorris*, 643 F.2d at 463 (App. 10a).

Welch testified in regard to his credentials and experience as a polygrapher. He then described the various types of instruments used in polygraph examinations and how such instruments work. Welch further described the procedures used and the setting in which the respondent was examined. He testified that the results of the polygraph examination supported respondent's denial of involvement in the strong-armed robbery of the victim.

As noted in the opinion of the Seventh Circuit, "[t]he trial court concluded that the polygraph evidence was both reliable and probative, 'an important piece of evidence for the jury to consider and weigh in arriving at its verdict' in light of the evidence at trial." *McMorris,* 643 F.2d at 460 (App. 4a). Relief was denied, however, on the basis of Wisconsin law governing the admission of polygraph evidence.

Respondent then filed an appeal of the denial of his post-trial motion to the Wisconsin Supreme Court. The state argued waiver, as well as the lack of merit of respondent's claim, on appeal. The Wisconsin Supreme Court did not consider the issue of waiver — the court having reaffirmed the stipulation requirement in a lengthy and exhaustive opinion filed simultaneously with the *per curiam* opinion affirming the respondent's conviction:

> In *Lhost v. State, No. 76-564-CR,* [85 Wis. 2d 620, 271 N.W.2d 121 (1978)] decided herewith, it was found that the prosecutor's refusal to stipulate to the admissibility of a polygraph examination is not a denial of due process of law. The jury had an opportunity to hear the Plaintiff in Error's testimony as well as the victim's and assess the credibility of each. If the examiner's testimony had been admitted, the jury would have had to assess the examiner's credibility in order to determine

> the weight to be given to his conclusion that the Plaintiff in Error was truthful. The prosecutor was entitled to make a good faith determination that a collateral issue of this nature should not be presented to the jury. In this case the prosecutor had not agreed to stipulate to this examination nor had the court approved a lie detector stipulation before trial. Therefore, the trial court properly refused to admit the testimony of the examiner under *State v. Stanislawski*, 62 Wis. 2d 730, 216 N. W. 2d 8 (1974).

(App. 34a).[2]/

Respondent then petitioned the Federal District Court for a writ of habeas corpus. The district court denied the petition. The original memorandum and order of the district court, entered on August 28, 1979, articulated its perception of the basis for the evidentiary rule in Wisconsin — the ongoing concern regarding reliability — and, the fact that although there is a small minority of isolated authority to the contrary, the vast majority of jurisdictions do *not* consider polygraph testimony reliable and, therefore, admissible absent a stipulation (App. 25a-26a). Respondent then raised the specific issue[3]/ — whether in light of the Seventh Circuit's decision in *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir. 1978), it is a violation of due process to mechanistically exclude critical, exculpatory polygraph testimony in a criminal trial, which the trial judge had found reliable and relevant,

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[2] The Seventh Circuit Court of Appeals also did not consider waiver because the Wisconsin Supreme Court "reached the merits of the due process claim." *McMorris*, 643 F.2d at 460, n. 2 (App. 4a).

[3] The District Court considered a letter request of the respondent's attorney as a motion for reconsideration based upon Rule 60 (b) of the Federal Rules of Civil Procedure.

solely because the prosecution refused to stipulate to its admittance. The second memorandum and order of the district court, entered on March 20, 1980, rejected the argument. The district court concluded:

> Proceeding from the premise that the state is free, if it chooses, to exclude polygraph evidence completely, *United States v. Masri*, 547 F.2d 932 (5th Cir.), *cert. denied*, 434 U.S. 907 (1977), it is clear that because the reliability of polygraph results generally is still an open question both in Wisconsin and elsewhere, the state is also free to place whatever restrictions on its admissibility it decides are necessary. As defendants correctly assert, it is a basic principal of our federal system that the state be allowed to experiment in the development of their own methods of administering justice. *See Patterson v. New York*, 432 U.S. 197 (1977). Such experimentation is to be encouraged providing it comports with the fundamental principles of due process and justice.
>
> Based on the evidence before it, the Court finds that the stipulation rule of *Stanislawski* does not violate any constitutional rights of the accused ...

McMorris, Memorandum and Order, March 20, 1980, slip op. at 5-6 (App. 31a-32a).

Respondent then appealed the denial of habeas corpus relief to the Seventh Circuit Court of Appeals. Respondent advanced the same argument on appeal. At the outset, however, respondent conceded three points: (1) that polygraph testimony is not inherently reliable; (2) that he has no absolute right to present polygraph testimony in judicial proceedings; and (3) that a stipulation requirement does not inherently

serve as an arbitrary device to exclude defense evidence.

The Seventh Circuit separately decided two issues: (1) whether the state justifications for the existence of the stipulation requirement were sufficient to permit, as a constitutional matter, enforcement of that requirement and (2) whether the prosecutor's absolute right to refuse to enter into the proffered stipulation without giving the reasons for that refusal was constitutionally permissible. The resolution of both issues was premised upon the perception by the Seventh Circuit that the Wisconsin Supreme Court had judicially created the *Stanislawski* stipulation requirement on the basis that polygraph evidence is both reliable and capable of informed consideration by a jury. *McMorris*, 643 F.2d at 462-63, 465-66, n. 19 (App. 15a).

In regard to the first issue, the Seventh Circuit considered only one of the available state justifications — that the pretest stipulation enhances the reliability of the test — and deemed that state justification to be a valid one. The state takes no issue with that portion of the decision. However, the state does take exception to the court's preclusion of the other two available "traditional" state justifications — questionable reliability and the potential that juries may improperly regard polygraph evidence as infallible. *McMorris*, 643 F.2d at 462 (App. 8a-10a).

In regard to the second issue, the Seventh Circuit, in essence, held that a prosecutor could be forced to enter into an "unconsented" stipulation. In the words of the Seventh Circuit:

> [W]e find the prosecutor's veto of the test in the instant case to be constitutionally impermissible because he stated no reasons which might be reviewed by the trial court. From all

> that appears, he was acting solely for tactical reasons in the belief that a test would not be helpful to his case. If the prosecutor refuses *and states reasons*, it then becomes the duty of the court to determine whether the reasons offered rise above the purely tactical considerations present in a given case. Certainly, no proper state purpose is served by allowing a purely tactical veto power. We do not hold that Wisconsin may not absolutely refuse to admit polygraph evidence, or that a judge may not refuse to admit polygraph evidence in a particular case; we merely hold that it offends due process for the prosecutor, as an adversary, to exercise an unrestricted veto—unrelated on the record to any reasons appropriate to the stipulation requirement—over the significantly exculpatory polygraph evidence in the instant case.
>
> We therefore hold that the refusal of the prosecutor to enter into the stipulation offered here may have violated the petitioner's right to be tried in accordance with the due process clause. We remand this action to the district court, however, for further proceedings to assess whether the prosecutor had valid reasons for refusing to enter into the stipulation offered by the defendant. If the refusal was unjustified, the petition for writ of habeas corpus should be granted.

McMorris, 643 F.2d at 466 (footnotes omitted) (App. 16a-17a). Thus, as a result of the holding, there is virtually nothing left of the stipulation requirement. This second issue, as the first, was based upon the Seventh Circuit's perception that the Wisconsin decisions recognized polygraph evidence as reliable. In addition, the Seventh Circuit distinguished the Wisconsin stipulation requirement from the stipulation

requirements of other states by suggesting that Wisconsin's rule was not a "consent" rule. *McMorris*, 643 F.2d at 465-66 (App. 15a). Footnote 19 is particularly relevant to their holding:

> 19. Admittedly, the Wisconsin rule does have some consensual elements. *See Lhost v. State*, 85 Wis.2d 620, 646, 271 N.W.2d 121, 133-34 (1978). The Wisconsin rule departs from what we describe as the "consent" approach, however, because Wisconsin believes that polygraph evidence admitted pursuant to a *Stanislawski* stipulation is both reliable and capable of informed consideration by the jury.

A timely Petition for Rehearing *En Banc* was filed in the Seventh Circuit. Petitioner contended that the decision of the Seventh Circuit was based upon misapprehensions of the reasons articulated by the Wisconsin Supreme Court for the state evidentiary rule of *State v. Stanislawski*, 62 Wis. 2d 730, 216 N.W.2d 8, and its progeny, requiring the prosecution and defense to enter into a valid consent stipulation as a precondition to the admission of polygraph testimony by either party at trial. On May 11, 1981, an order was entered by the Seventh Circuit *En Banc*, modifying footnote 19[4]/, inserting a recent citation, and denying the

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[4] Petitioner does not believe that the modification, reprinted below, alters the underlying premises for the opinion:

> While Wisconsin is justifiably reluctant to admit the results of *unstipulated* polygraph examinations, *see supra* at 9-11, it adopted in *Stanislawski* a much more positive approach with respect to the results of examinations conducted under conditions established pursuant to pre-test stipulations. The fundamental shift accomplished by *Stanislawski* is demonstrated by the fact that, before *Stanislawski*, even stipulated examinations were deemed incompetent. *See* note 16, *supra*. Characterizing the stipulation as a "waiver", *see Craft*,

(Footnote continued on following page)

petition. However, four (4) of the eight (8) circuit judges voted to grant the petition for rehearing *En Banc*.

Petitioner seeks this Court's writ of certiorari to review the resolution by the Seventh Circuit Court of Appeals of respondent's claims relating to lack of due process of law.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Failed To Accord Due Deference To Wisconsin's Role As A State Laboratory, Experimenting With The Admission Of Polygraph Evidence, By Interfering With An Evidentiary Rule Created By The State Of Wisconsin To Govern The Admission Of Such Evidence.

In our federal system, in the absence of a constitutional imperative, the evidentiary rules established by a state, such as the one here challenged by respondent in the Seventh Circuit, should not be

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99 Wis. 2d at 134, 298 N.W. 2d at 532, does not affect the thesis underlying *Stanislawski* that the results of stipulated polygraph examinations are competent evidence; the "waiver" consists in the agreement of the parties to forego otherwise potentially valid objections to the admission of the results of the examination such as, for example, that the examiner was not qualified. The evidence is inadmissible in the absence of the stipulation because it is not sufficiently reliable without the stipulation. *Lhost*, 85 Wis. 2d at 645, 271 N.W. 2d at 133. This approach does not mean that Wisconsin is a pure "consent" state (where stipulated polygraph evidence, even if admitted, would not be regarded as competent).

(App. 19-20a).

interfered with by the federal courts. *See Fisher v. United States,* 328 U.S. 463 (1946). *Patterson v. New York,* 432 U.S. 197 (1977), in which this Court reviewed another evidentiary rule, provides observations of our federal system significant to the instant case:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134, 98 L.Ed. 561, 74 S.Ct. 381 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Speiser v. Randall, 357 U.S. 513, 523, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958); Leland v. Oregon, 343 U.S. 790, 798, 72 S.Ct. 1002, 1007, 96 L.Ed.2d 1302 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).

Patterson, 432 U.S. at 201-02.

As a necessary corollary to the basic principle of Federalism here expressed, the Federal Constitution does not foreclose experimentation by the states in the development of evidentiary rule. This Court in *Fay v. People of State of New York,* 332 U.S. 261 (1947), where there was a challenge to the constitutionality of the special or so-called "blue ribbon" jury as used by the state court, stated the following:

> Well has it been said of our power to limit state action that "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Mr. Justice Brandeis, dissenting in New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747.

Fay, 332 U.S. at 296. *Accord, Chandler v. Florida*, — U.S. —, 101 S. Ct. 802, 812 (1981); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971); *Powell v. State of Texas*, 392 U.S. 514, 537 (1968).

A review of the decisions involving the admission of polygraph testimony from *State v. Stanislawski*, 62 Wis. 2d 730, 216 N.W.2d 8, to the decision of the Seventh Circuit in the instant matter, leaves no doubt that there was a serious division of the members of the Wisconsin Supreme Court on the question of whether polygraph testimony should have been admissible under any circumstances. At the same time that a majority of the court refused to withdraw the stipulation requirement, a minority of the court which would have excluded all polygraph testimony increased from one dissenting justice in *State v. Mendoza*, 80 Wis. 2d 122, 189-90, 258 N.W.2d 260, 290 (1977), to three dissenting justices in a more recent decision — *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

The Seventh Circuit was well aware of the growing skepticism in the Wisconsin Supreme Court. The state concluded its brief to the Seventh Circuit in the following manner:

> It is readily apparent that the conclusion of the court below in the original order — that there is a continuing controversy surrounding the reliability of the polygraph — is not only true in regard to the various jurisdictions, but is equally true among the justices of the Wisconsin Supreme Court. Moreover, as recognized in the memorandum decision supporting the denial of the motion for reconsideration, in this controversial area, there must be room for the State of Wisconsin to experiment and develop its own evidentiary rules based upon the judicial view of the reliability of this type of evidence. Until now, there has been no majority pronouncement of reliability. However, for the reasons already stated, the Wisconsin Supreme Court has followed the lead of numerous other jurisdictions, and has opened the door for the conditional admission of this otherwise inadmissible evidence. If the state is denied the opportunity to fashion its own evidentiary rules through experimentation, in view of the recent dissents, this will almost certainly result in a complete rule of exclusion in future decisions — the door will be again closed. To force such a result, in the absence of a constitutional imperative, would violate the deference to be accorded by the federal courts. *Patterson v. New York*, 432 U.S. 197; *Fisher v. United States*, 328 U.S. 463.

Brief of Respondent in Seventh Circuit, at 46-7. The state's words appear to have been prophetic. On July

6, 1981, two months after the denial of the Petition for Rehearing *En Banc* in the instant matter, *McMorris*, the Wisconsin Supreme Court decided *State v. Dean*, — Wis. 2d —, 307 N.W.2d 628 (1981).

In *Dean*, the Wisconsin Supreme Court held that "polygraph evidence is not to be admitted in any criminal proceeding in this state unless the *Stanislawski* stipulation was executed on or before September 1, 1981." *Dean*, — Wis.2d —, 307 N.W.2d at 629. In essence, polygraph testimony is hereinafter inadmissible in Wisconsin.

The decision of the Seventh Circuit, failing to recognize legitimate experimentation with an evidentiary rule in this controversial area, may very well have hastened the conclusion of the experiment in Wisconsin. While it is true that the Wisconsin Supreme Court did not state in *Dean* that the decision of the Seventh Circuit in *McMorris* forced the abandonment of the *Stanislawski* rule in *Dean*, a review of the chronology of decisions demonstrates the effect of *McMorris* on the decision to abandon the stipulation requirement of *Stanislawski* in *Dean*. It must be noted that there had been three decisions in the previous six months — *Robinson v. State*, 100 Wis. 2d 152, 301 N.W.2d 429 (1981); *State v. Craft*, 99 Wis. 2d 55, 298 N.W.2d 530 (1980); *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980) — all *without* dissent and not even hinting any dissatisfaction with *Stanislawski*.

The dual concepts of federalism and comity require this Court to be sensitive to a change of position in regard to a state evidentiary rule which may have been necessitated by a federal court decision. However, even if this Court were not convinced that the change of position resulted from the decision of the Seventh Circuit, the demonstrable interference with the legitimate policy decision by the Wisconsin Supreme

Court to create the evidentiary rule here at issue requires review by this Court.

II. The Court of Appeals Has Rendered A Decision Having A Significant Adverse Impact On The Administration Of Criminal Justice In The State Of Wisconsin Based Upon A Erroneous Perception Of Wisconsin Decisions Relating To The Conditional Admission Of Polygraph Evidence.

A. The Court of Appeals has erroneously interpreted decisions of the Wisconsin Supreme Court to find unconsitutional an evidentiary rule of the State of Wisconsin.

Significantly, the most recent decision of the Wisconsin Supreme Court in *State v. Dean,* — Wis.2d —, 307 N.W.2d 628 (1981) — as did the petition for reconsideration in *McMorris* — points to and rejects the two misapprehensions by the Seventh Circuit of *Stanislawski,* and its progeny, which form the basis of the *McMorris* decision. In *Dean,* the state court specifically stated that the Seventh Circuit misaprehended the Wisconsin Supreme Court's holdings in regard to the reliability of polygraph testing, and also misapprehended the stipulation requirement on a basis unfounded by the decisions of the Wisconsin Supreme Court — that the Wisconsin stipulation requirement differs from other stipulation requirements because it is not a consent rule. The state court stated: "*Stanislawski* is, contrary to the interpretation of the Seventh Circuit Court of Appeals, based substantially on principles of consent and wavier rather than on the

principles of scientific reliability." *Dean,* — Wis.2d —, 307 N.W.2d at 642.

That specific re-articulation by the Wisconsin Supreme Court of its previous holdings, although after *McMorris,* is fully supported by and consistent with all of the earlier decisions exhaustively reviewed in the decision — *Robinson v. State,* 100 Wis. 2d at 162, 201 N.W.2d at 434; *State v. Craft,* 99 Wis. 2d 128, 298 N.W.2d 530; *Pickens v. State,* 96 Wis. 2d 549, 292 N.W.2d 601; *McLemore v. State,* 87 Wis. 2d 739, 275 N.W.2d 692; *Lhost v. State,* 85 Wis. 2d 620, 271 N.W. 2d 260; Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978); *State v. Mendoza,* 80 Wis. 2d 122, 258 N.W.2d 260; *Gaddis v. State,* 63 Wis. 2d 120, 216 N.W.2d 527 (1974); *State v. Dean,* 98 Wis. 2d 74, 295 N.W.2d 23 (Ct. App. 1980); *State v. Craft,* 93 Wis. 2d 55, 286 N.W.2d 619 (Ct. App. 1979).

In *Lhost v. State,* 85 Wis. 2d 620, 271 N.W.2d 260, the most thorough review between *Stanislawski* and *Dean,* and decided contemporaneously with respondent's case, a unanimous Wisconsin Supreme Court not only reaffirmed the stipulation requirement in view of the most recent data, but more importantly, left no doubt of its strong reluctance to consider polygraph testimony as reliable:

> *Washington v. Texas, supra,* and *Chambers v. Mississippi, supra,* do not stand for the proposition that inherently unreliable evidence or evidence of questionable validity must be admitted into evidence as part of the defendant's right to compulsory process. In fact, to the contrary, in each case the court undertook an analysis to establish the reliability of the exluded testimony and then weigh the reliability and necessity for such evidence against the state's interest in its exclusion. *Washington* and *Chambers* do not mandate

> the admissibility of polygraph results without stipulation if this court finds the polygraph is not sufficiently reliable in the absence of a stipulation. ...
>
> ....
>
> Empirical data has not been supplied to establish the reliability of polygraph exams since *State v. Stanislawski, supra; Gaddis v. State, supra,* and this court's most recent pronouncement in *Zelenka v. State,* supra.

Lhost, 85 Wis. 2d at 638-39, 271 N.W.2d at 130.

> *We therefore come to the conclusion that unstipulated polygraph exams are not sufficiently accurate and reliable so as to mandate the abandonment of our holding in Stanislawski. A defendant's right to compulsory process does not encompass the right to introduce unreliable evidence which overrides "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence." Chambers v. Mississippi, supra* at 302; *State v. Conner, supra* at 458. The Wisconsin stipulation rule pronounced in *Stanislawski* is designed to assure the fairness and reliability in the introduction of polygraph results in evidence.

Lhost, 85 Wis. 2d at 644-46, 271 N.W.2d at 132-33 (emphasis added; footnotes omitted).

Moreover, contrary to the perception of the Seventh Circuit, Wisconsin is what the court has described as a "consent" state. In the context of the *Stanislawski* rule, the stipulation waives any objection *by the parties* to the admission of the polygraph testimony. It is an agreement *by the parties* to allow

into evidence what would otherwise be inadmissible evidence. In *Stanislawski,* 62 Wis. 2d 630, 216 N.W.2d 8, while establishing the conditions for admission, the Wisconsin Supreme Court *only* held that the "unconditional rejection of expert testimony based on polygraph testimony is no longer indicated." *Stanislawski,* 62 Wis. 2d 730, 216 N.W.2d 8. Thus, it *only* opened the door for conditional admissibility for parties who would wish to agree to its admission. *Stanislawski* did *not* hold that polygraph testimony is reliable — therefore, admissible. In *no* subsequent decision, involving polygraph testimony, has a majority of the Wisconsin Supreme Court held so either. *See State v. Streich,* 87 Wis. 2d 209, 274 N.W.2d 635 (1979); *McLemore v. State,* 87 Wis. 2d 739, 275 N.W.2d 692; *Zelenka v. State,* 83 Wis. 2d 601, 266 N.W.2d 279; *Lhost v. State,* 85 Wis. 2d 620, 271 N.W.2d 121; *State v. Mendoza,* 80 Wis. 2d 122, 258 N.W.2d 260; and *Gaddis v. State,* 63 Wis. 2d 120, 216 N.W.2d 527.

In fact, one of the most recent pronouncements of the Wisconsin Supreme Court, *State v. Craft,* 99 Wis. 2d 128, 298 N.W.2d 530, preceding the decision in the matter here being considered, clearly placed Wisconsin in the category of "consent" states:

> The written accord contemplated by our decision in *State v. Stanislawski, supra,* has always been denominated as a "stipulation." As such, it is not an ordinary agreement governed exclusively by the law of contracts. "A stipulation is a contract, but it is a contract made in the course of judicial proceedings, and a contract so made has certain incidents that do not belong to contracts made outside of judicial proceedings." *Southern C. Co. v. Howard Cole & Co.,* 185 Wis. 469, 476, 201 N.W. 817 (1925).

> There are essentially two types of stipulations. *Id.* at 476. The first and most common variety of stipulations concerns matters of trial procedure. The second category consists of agreements which have the essential characteristics of a mutual contract and which are exemplified by stipulations in settlement of a legal dispute. *See e.g., Pasternak v. Pasternak,* 14 Wis.2d 38, 109 N.W.2d 511 (1961). The *Stanislawski* stipulation falls within the first category. *It is essentially a waiver of an objection to evidence which would otherwise be inadmissible. Lhost v. State,* 85 Wis.2d at 646. It is therefore an agreement concerning a matter of trial procedure.

Craft, 99 Wis. 2d at 133-34, 298 N.W.2d at 532 (emphasis added).

Thus, while Wisconsin has never pronounced polygraph testimony reliable and is, in fact, a "consent" state, the decision of the Seventh Circuit would require the admission of polygraph testimony, even over a prosecutor's objection. In essence, the *McMorris* decision emasculated the stipulation requirement.

B. The decision of the Court of Appeals has a significant adverse impact on the administration of criminal justice in Wisconsin.

Notwithstanding the most recent decision of the Wisconsin Supreme Court in *State v. Dean,* — Wis.2d —, 307 N.W.2d 628, the decision of the Seventh Circuit has and will have a significant adverse effect on the administration of criminal justice in Wisconsin. The stipulation requirement of *Stanislawski,* and its progeny, has been the law for over seven years in

Wisconsin. Formal and informal attempts by criminal defendants to enter into polygraph stipulations have occurred in countless cases. Challenges similar to the one upon which this respondent prevailed are presently pending in Wisconsin courts. Undoubtedly, there will be many more post-trial challenges, employing the *McMorris* rationale, to convictions obtained during the period of April 2, 1974 to September 1, 1981. The adverse effect of the erroneous decision is only limited, not eliminated, by the most recent decision of the Wisconsin Supreme Court.

Moreover, the decision in the instant matter may very well have an adverse effect on future experimentation in this controversial area. As the concurring opinion in *Dean* notes, the majority opinion of the Wisconsin Supreme Court hedged on its pronouncement of inadmissibility, — Wis.2d —, 307 N.W.2d at 653-54. It may be that in the future the Wisconsin Surpeme Court will again undertake to set rules on the admissibility of polygraph evidence. If it does, it should not be restricted in its approach at such time by the limitation resulting from the erroneous decision reached in the instant matter.

III. This Case Presents An Opportunity For This Court To Address Itself To An Issue Of Substantial Constitutional Significance Which Has Not Heretofore Received This Court's Attention.

This Court has not in any case considered the issue of the constitutional validity of any procedure utilized in the admission or exclusion of polygraph evidence. While authoritative studies on the reliability of polygraph evidence are in dispute, *see Lhost*, 85 Wis.

2d at 639-40, 271 N.W.2d at 130-31, n. 8-10, recent and pending evaluation of rules for admission of such evidence lend support to the need for immediate review. *See, e.g.*, Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Courts*, 15 Am. Crim. L. Rev. 29; Comment, *Compulsory Process and Polygraph Evidence: Does Exclusion Violate a Criminal Defendant's Due Process Rights*, 12 Conn. L. Rev. 324 (1980). Clearly, this Court's decisions in *Washington v. Texas*, 388 U.S. 14 (1967) and *Chambers v. Mississippi*, 410 U.S. 284 (1972), most often analyzed, do not stand for the proposition that inherently unreliable evidence or evidence of questionable reliability must be admitted into evidence as part of the defendant's Sixth Amendment right to compulsory process. *Accord, Lhost*, 85 Wis. 2d at 63, 271 N.W.2d at 129.

This case — with only the credibilty of the victim and respondent at issue at trial — presents this Court with the clear opportunity to determine whether the admission of polygraph evidence, with its characteristic of questionable reliability, is required by the Constitution of the United States. While the debate on the reliability of polygraphy has been lengthy, absent a final decision by this Court, the effect of the *McMorris* decision, if left unreviewed, will be to place a questionable constitutional restraint on state experimentation in this controversial area.

IV. The Issue Raised By This Case Has Substantial Import For A Significant Number Of American Jurisdictions.

The issue of the constitutional validity of a state rule requiring the prosecution and the defense in a

criminal proceeding to enter into a valid stipulation as a precondition to the admission of polygraph testimony by either party at trial is of more than local concern to the State of Wisconsin. Such issue has substantial import for a majority of American jurisdictions.

At least twenty-three (23) other states have similar rules limiting the admissibility of polygraph testimony. See *State v. Madsen*, 609 P.2d 1046 (Ariz. 1980) *(En Banc)*; *State v. Bullock*, 557 S.W.2d 193 (Aka. Super. Ct. 1977); *People v. Paul*, 144 Cal. Rptr. 431, 78 C.A.3d 32 (Cal. App. 1978); *People v. Trujillo*, 136 Cal. Rptr. 672 (Cal. App. 1977); *People v. Orr*, 566 P.2d 1361 (Colo. App. 1977); *State v. Saia*, 372 A.2d 144 (Conn. 1976); *Thompson v. State*, 378 A.2d 117 (Del. 1978); *Young v. State*, 387 So. 2d 512 (Fla. App. 1980); *Bundren v. State*, 270 S.E.2d 807 (Ga. App. 1980); *State v. Warden*, 592 P.2d 836 (Idaho 1979); *Helton v. State*, 402 N.E.2d 1263 (Ind. 1980); *State v. Fisher*, 279 N.W.2d 265 (Iowa 1979); *State v. Blosser*, 558 P.2d 105 (Kan. 1976); *State v. Hill*, 253 N.W.2d 378 (Minn. 1977); *Corbett v. State*, 584 P.2d 704 (Nev. 1978); *State v. Stewart*, 364 A.2d 621 (N.H. 1976); *State v. Baskerville*, 374 A.2d 441 (N.J. 1977); *State v. Milano*, 256 S.E.2d 154 (N.C. 1979); *State v. Sonel*, 372 N.E.2d 1318 (Ohio 1978); *State v. Skelton*, 599 P.2d 1171 (Ore. App. 1979); *State v. Watson*, 248 N.W.2d 398 (S.D. 1976); *State v. Collins*, 612 P.2d 775 (Utah 1980); *State v. Sutherland*, 617 P.2d 1010 (Wash. 1980) *(En Banc)*; *Cullin v. State*, 565 P.2d 445 (Wyo. 1977). Thus, the decision of the Seventh Circuit directly brings into question the validity of those state evidentiary rules.[6]/

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[6] At least one Federal Circuit has a stipulation requirement for the admission of polygraph evidence at Federal Criminal trials within the circuit. *United States v. Oliver*, 525 F.2d 731, 736-37 (8th Cir. 1975)

Furthermore, the decision of the Seventh Circuit has potential impact on the criminal procedure in a significant number of other American jurisdictions which presently exclude all polygraph evidence, but might wish to provide for conditional admissibility in the future. *See, e.g., Pulakis v. State,* 476 P.2d 474, 479 (Alaska 1970); *State v. Antone,* 615 P.2d 101, 109 (Haw. 1980); *People v. Monigan,* 390 N.E.2d 562, 567 (Ill. App. 1979); *Conley v. Commonwealth,* 382 S.W.2d 865 (Ky. 1964); *State v. Corbin,* 285 So. 2d 234, 239 (La. 1973); *State v. Gagne,* 343 A.2d 186, 192 (Me. 1975); *Akonom v. State,* 394 A.2d 1213 (Md. App. 1978); *People v. Barbara,* 255 N.W.2d 171 (Mich. 1977); *Jordan v. State,* 356 So. 2d 1198, 1204 (Miss. 1978); *State v. Beachman,* 616 P.2d 337, 339 (Mont. 1980); *State v. Biddle,* 599 S.W.2d 183, 187 (Mo. 1980) *(En Banc); State v. Steinmark,* 239 N.W.2d 495, 497 (Neb. 1976); *State v. LaForest,* 207 A.2d 429 (N.H. 1964); *Fulton v. State,* 541 P.2d 871 (Okl. Cr. App. 1975); *Commonwealth v. Gee,* 354 A.2d 875, 883 (Pa. 1976); *State v. Watson,* 248 N.W.2d 398 (S.D. 1976); *Robinson v. State,* 550 S.W.2d 54, 59 (Tex. Cr. App. 1977); *Jones v. Commonwealth,* 204 S.E.2d 247, 248 (Va. 1974); and *State v. Frazier,* 252 S.E.2d 39, 43 (W. Va. 1979).

Thus, there can be no doubt that the issue presented by this case is of national significance. The resolution of the issue by this Court would have a direct and substantial impact on the procedures established in a large number of American jurisdictions for the admission of polygraph evidence.

V. The Decision Of The Seventh Circuit Is In Conflict With The Decision Of The Eighth Circuit In *Conner v. Auger*, 595 F.2d 407 (1979), Necessitating A Resolution Of This Issue By This Court.

In *State v. Conner*, 241 N.W.2d 447 (Iowa 1976), cited approvingly by the Wisconsin Supreme Court in *Lhost*, 85 Wis. 2d at 645-46, 271 N.W.2d at 133-34, the Supreme Court of Iowa, confronting precisely the same contention as that raised by this respondent in the state court, and precisely the same appellate authority in support of it as that cited by the respondent, stated:

> This court has held on several occasions that polygraph evidence may be admitted into evidence only by stipulation of the parties. Unstipulated polygraph evidence may not be admitted. *State v. Maynard*, 232 N.W.2d 265 (Iowa 1975); *State v. Jones*, 193 N.W.2d 509, 512 (Iowa 1972); *State v. Galloway*, 167 N.W.2d 89, 95 (Iowa 1969); *State v. Freeland*, 255 Iowa 1334, 1339, 125 N.W.2d 825, 828 (1964).
>
> Defendant contends the rule should be changed. This contention rests on three grounds. First, he asserts it denied him his right to compulsory process under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, § 10, of the Iowa Constitution. ...
>
> Regarding the first ground, defendant relies on *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), and *State v. Dorsey*, 87

N.M. 323, 532 P.2d 912 (1975), *aff'd*, 88 N.M. 184, 539 P.2d 204 (1975).

In *Washington v. Texas*, the Supreme Court held the Sixth Amendment right of an accused to have compulsory process for obtaining witnesses in his favor applies in state criminal trials under the due process clause of the Fourteenth Amendment. The court held that a Texas statute which disqualified an alleged accomplice from testifying in behalf of a defendant infringed the right to compulsory process because it arbitrarily denied the defendant the right to the accomplice's testimony. In *Chambers v. Mississippi*, the Supreme Court held due process was violated by state rules of evidence which precluded a defendant from offering evidence bearing on another person's guilt of the offense charged. Chambers was denied the right to cross-examine that person regarding his repudiation of a sworn confession to the crime, and he was denied the right to introduce testimony showing oral confessions to the crime by that person. In *State v. Dorsey*, the New Mexico court applied the rationale of *Chambers v. Mississippi* in part to sustain the admissibility of unstipulated defense polygraph evidence.

We are not persuaded that the holdings in *Washington v. Texas* and *Chambers v. Mississippi* dictate or support the result reached in New Mexico and advocated by defendant in this case. A defendant's due process right to present evidence in his defense in a state criminal trial does not override "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."

Chambers v. Mississippi, 410 U.S. at 302, 93 S.Ct. at 1049, 35 L.Ed.2d at 313. To sustain defendant's constitutional attack on the trial court's ruling excluding defendant's proffered polygraph evidence, it would be necessary for us to determine that the rule excluding unstipulated polygraph evidence does not rest on considerations of fairness and reliability.

As our previously cited cases show, our rule rests on such considerations. Moreover, current holdings of most other courts are in agreement. Arguments for and against admissibility of unstipulated polygraph evidence and recent decisions of other courts are discussed in *United States v. Alexander*, 526 F.2d 161 (8 Cir. 1975). That court held:

> "After careful review of the numerous materials presently available discussing polygraphy, we conclude that the results of unstipulated polygraph examinations should not be admissible in evidence at a criminal trial. While the polygraphic science and its instruments have advanced significantly ***, we are still unable to conclude that there is sufficient scientific acceptability and reliability to warrant the admission of the results of such tests in evidence." *Id.* at 166.

We find no merit in defendant's contention that the trial court's ruling excluding unstipulated polygraph evidence denied him his constitutional rights to compulsory process and due process.

Conner, 241 N.W.2d at 457-58.

Conner, as did this respondent, brought a petition for a writ of habeas corpus to collaterally challenge the state evidentiary rule limiting the admissibility of polygraph evidence. With the exhaustive treatment of the Iowa Supreme Court before it, the Eighth Circuit quickly disposed of the challenge and denied the petition. *Conner*, 595 F.2d at 411. Clearly, the resolution of the collateral attack in *Conner* differs from the resolution of the collateral attack in the instant matter. Recognizing the legitimate interest of the states in creating evidentiary rules for criminal proceedings, there is a real need for resolution of the conflict between the two federal circuits.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari should issue from this Court to review the decision of the Court of Appeals for the Seventh Circuit.

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In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 79-2285 & 80-1568

Darrel McMorris,
Petitioner-Appellant,

v.

Thomas Israel and
Bronson C. LaFollette,
Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 79-C-325—**Robert W. Warren,** *Judge.*

ARGUED SEPTEMBER 24, 1980 —
DECIDED MARCH 9, 1981

Before SWYGERT, *Circuit Judge,* SKELTON, *Senior Judge,** and CUDAHY, *Circuit Judge.*

CUDAHY, *Circuit Judge.* Appellant McMorris was convicted of strong-armed robbery in Wisconsin state court. He now appeals from the denial of his petition for federal habeas corpus relief. 28 U.S.C. § 2254 (1976). McMorris challenges the Wisconsin procedure for the admission of polygraph evidence and alleges that the exclusion of exculpatory polygraph evidence denied him a fair trial in violation of his rights under the United States Constitution. We reverse and remand for further proceedings.

At petitioner's trial in state court, the prosecution presented only one witness, the victim, who identified the petitioner as the person who had grabbed him from

* The Honorable Byron G. Skelton, Senior Judge of the United States Court of Claims, is sitting by designation.

behind, taken his wallet and pushed him to the ground. On cross-examination the victim conceded that it was dark at the time of the attack and that the whole incident was over very quickly. The victim also conceded that he had never seen the defendant before and that he was unable to give a description of his assailant. The petitioner took the stand and denied any involvement in the crime, claiming that the victim was mistaken in his identification of the petitioner as his assailant.

Realizing the importance of credibility in such a case, the petitioner sought to take a polygraph examination prior to trial. Evidence of a polygraph test taken by a defendant is admissible in Wisconsin under the conditions set forth in *State v. Stanislawski*, 62 Wis.2d 730, 216 N.W.2d 8 (1974). *Stanislawski* provides that expert opinion evidence as to polygraph tests is admissible with respect to the defendant's credibility when the following preconditions are met:

> (1) That the district attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs, and the examiner's opinion thereon on behalf of either defendant or the state.
>
> (2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial court, i.e., if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.
>
> (3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

(a) the examiner's qualifications and training;

(b) the conditions under which the test was administered;

(c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and

(d) at the discretion of the trial court, any other matters deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate whether at the time of the examination defendant was telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.

62 Wis.2d at 742-43, 216 N.W.2d at 14 (footnotes omitted).[1]

In order to comply with *Stanislawski*, trial counsel for the petitioner contacted the prosecutor seeking a *Stanislawski* stipulation. After some initial indecision, the prosecutor refused to enter into the stipulation but gave no reason for his refusal. The request was renewed shortly before trial but the prosecutor again refused without explanation.

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[1] The Wisconsin court adopted the formulation of the Arizona Supreme Court set out in *State v. Valdez*, 91 Ariz. 274, 283-84, 371 P.2d 894, 900 (1962) (en banc).

After petitioner was convicted, he filed a post-conviction motion in state court challenging the exclusion of the polygraph testimony. A hearing was held before the trial judge at which evidence was introduced as to a polygraph examination taken by petitioner after he was convicted. The results of the polygraph examination supported petitioner's claim that he had not committed the robbery. The trial court concluded that the polygraph evidence was both reliable and probative, "an important piece of evidence for the jury to consider and weigh in arriving at its verdict" in light of the evidence received at trial. The trial court reluctantly denied any relief, however, on the basis of Wisconsin law governing the admission of polygraph evidence. The Wisconsin Supreme Court affirmed in an unpublished per curiam opinion.[2]

The defendant then filed for habeas corpus relief in federal court. The district court denied relief because it found that the Wisconsin stipulation requirement did not deny the defendant due process of law. A motion for reconsideration was also denied and the petitioner now appeals from these rulings.

I. The Constraints Imposed by the Due Process Clause

Every state is generally free to exercise its sovereign prerogative as to the evidence it will admit in its courts. The federal constitution, however,

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[2] The State asserted at oral argument that petitioner had somehow waived his due process claim by failing to offer the testimony at trial or by failing to seek an order from the trial judge compelling the prosecutor to enter into the stipulation. The State raised these same alleged procedural irregularities before the Wisconsin Supreme Court. It is clear, however, that petitioners due process claim is properly before us because the state courts reached the merits of the due process claim. *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979); *Leftkowitz v. Newsome*, 420 U.S. 283, 292 n.9 (1975).

imposes a limited restraint upon state evidentiary rules where exculpatory evidence is excluded by arbitrary state rules. *Washington v. Texas*, 388 U.S. 14 (1967). The genesis of this restriction is found in the defendant's sixth amendment right to "compulsory process for obtaining witnesses in his favor."[3] The Constitution imposes this limitation because the state may not deny an accused in a criminal trial the right to a fair opportunity to defend against the state's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). However, "the right of a defendant to present relevant and competent evidence is not absolute and many 'bow to accommodate other legitimate interests in the criminal trial process,'" *Hughes v. Mathews*, 576 F.2d 1250, 1258 (7th Cir.), *cert. dismissed*, 439 U.S. 801 (1978) (citing *Chambers*, 410 U.S. at 295), although the competing state interests must be substantial to overcome the claims of the defendant.[4] Our task is thus to evaluate the exculpatory significance of the proffered polygraph evidence[5] and then to balance it against the competing

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[3] U.S. Const. amend. VI. This right applies to the states through the due process clause of the fourteenth amendment. *Washington v. Texas*, 388 U.S. at 19.

[4] Westen, *The Compulsory Process Clause*, 73 U. Mich. L. Rev. 71, 156 (1973). *See also United States v. Nixon*, 418 U.S. 683, 712-13 (1974); *cf. Davis v. Alaska*, 415 U.S. 308, 319-20 (1974) (the state's interest in protecting the anonymity of a juvenile offender must yield to the defendant's right to confront an adverse witness).

[5] In *Hughes v. Mathews*, 576 F.2d 1258 (7th Cir.), *cert. dismissed*, 439 U.S. 801 (1978), this court employed a different analysis to strike down the Wisconsin rule excluding psychiatric testimony on the issue of the defendant's specific intent. *Hughes* evaluated the relevance and competence of the excluded evidence under state law. 576 F.2d at 1256-58. *Hughes*, however, invalidated the Wisconsin rule because of its facial unconstitutionality. We are here adopting the much more limited position that the exclusion of the polygraph

(Footnote continued on following page)

state interest in the procedural rules that prevented the defendant from presenting this evidence at his trial. *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 972 n.10 (3d Cir. 1980). Petitioner challenges both the stipulation requirement in general and the refusal of the prosecutor to enter into the stipulation offered in this case. We shall review separately the state justifications both for the existence of the stipulation requirement and for the prosecutor's refusal to enter into the stipulation proffered here.[6]

A. The Exculpatory Significance of the Defendant's Polygraph Evidence

It seems obvious that evidence of a favorable polygraph examination taken by the defendant would have been of great importance to the defense of the Wisconsin charge. The entire prosecution case rested

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evidence under the particular circumstances of the instant case deprived this defendant of his constitutional rights. This approach is consistent with the Supreme Court's analysis of the specific circumstances in *Chambers* as well as with its more recent decision, *Green v. Georgia*, 442 U.S. 95 (1979), examining the exclusion of exculpatory evidence offered by the defendant. "[N]either *Chambers* nor *Washington* held the evidentiary rules in question facially unconstitutional." Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 807 (1976). We therefore decline to follow the *Hughes* analysis in the present context.

We would, however, reach the same result with respect to the one infirmity that we find if we tested the relevance and competence of the excluded polygraph evidence using the *Hughes* approach. Testimony as to the results of a polygraph examination conducted pursuant to a *Stanislawski* stipulation is both relevant and competent evidence under Wisconsin law. *Lhost v. State*, 85 Wis.2d 620, 646, 271 N.W.2d 121, 133 (1978) (quoted *infra* at page 15). The misgivings expressed by the court in *Lhost* as to the utility of polygraph evidence referred to the results of *unstipulated*

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on the testimony of the victim as to the identity of his assailant. Given the problems inherent in such an identification, *see* O'Connor, *"That's the Man": A Sobering Study of Eyewitness Identification and the Polygraph*, 49 St. John's L. Rev. 1, 26-27 (1974), particularly an identification based upon a short observation in the dark while being knocked to the ground, the state's case was far from overwhelming. The defendant took the stand and denied any involvement in the crime. His credibility was the primary issue before the jury, and the jury's verdict reflects its decision not to credit his testimony. Under these circumstances, a polygraph examination that bolstered the defendant's credibility might easily have been decisive in securing an acquittal. Although we do not wish to become embroiled in a "numbers game", we note that even the most ardent detractors from the validity of polygraph evidence concede a degree of reliability of 70% or higher for properly administered examinations.[7] Further, a large portion of this 30%

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examinations. By its failure to overrule *Stanislawski*, however, the court recognized that the results of stipulated examinations are sufficiently relevant and competent to be admitted into evidence. *Accord, United States v. Oliver*, 525 F.2d 731, 736-37 (8th Cir. 1975).

[6] Defendant has framed his challenge to the Wisconsin stipulation rule in broad due process terms, as was done by the defendant in *Chambers*, and we shall deal with his contentions in that way. The more correct approach is, however, to analyze the questions under the sixth amendment right to compulsory process although the due process standards are similar if not identical. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 607-08 (1978).

[7] *E.g.*, Kubis, *Comparison of Voice Analysis and Polygraph as Lie Detection Procedures*, 3 Polygraph 1, 39 (1974); Burkey, *The Case Against the Polygraph*, 51 A.B.A. J. 833, 856 (1965). By comparison the evidence unconstitutionally excluded in *Washington v. Texas* or *Webb v. Texas*, 409 U.S. 95 (1972) (per curiam), appeared to be much less reliable than the polygraph evidence excluded in the instant case.

"error" rate includes tests that yield inconclusive results — results that cannot fairly be described as "erroneous."[8] Where credibility is as critical as in the instant case, the circumstances are such as to make the polygraph evidence materially exculpatory within the meaning of the Constitution. *See* Westen, *Compulsory Process II*, 74 U. Mich. L. Rev. 191, 197 (1975).

II. The Available Justifications for *Stanislawski*

State and federal evidentiary rules excluding polygraph evidence have usually justified that exclusion by reference to two problems with polygraph evidence. Courts have been concerned with the reliability of the evidence itself as well as with the potential that juries may improperly regard polygraph evidence as infallible.[9] *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975). Wisconsin, however, has adopted the seemingly commendable position that its evidentiary rules should not be tied to the conditions of another era when circumstances differed markedly from the present. Since their initial historic rejection in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

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[8] *See, e.g.*, Wicker, *The Polygraph Truth Test and the Law of Evidence*, 22 Tenn. L. Rev. 711, 713 (1953) (75 to 80% accurate — 15 to 20% inconclusive — 5% error).

[9] The potential that the jury will improperly evaluate polygraph evidence presents the more important of the two objections. The degree of reliability goes more to the weight of the evidence. Certainly, as noted by the Eighth Circuit, polygraph examinations are reliable enough to pass the usual threshold for "relevant" evidence. *United States v. Oliver*, 525 F.2d 731, 737 n.11 (8th Cir. 1975). Fed. R. Evid. 401. A similar judgment is implicit in this court's consistent ruling that district courts have the discretion to admit polygraph evidence in a proper case. *United States v. Rumell*, 80-1155, 80-1161 (7th Cir. Mar. 3, 1981); *United States v. Bursten*, 560 F.2d 779, 785 (7th Cir. 1977); *United States v. Infelice*, 506 F.2d 1358, 1365 (7th Cir. 1974).

> polygraph tests have moved from the 'twilight zone' of *Frye* to such degree of standing and scientific recognition that unconditional rejection of expert testimony based on polygraph testimony is no longer indicated.

Stanislawski, 62 Wis.2d 730, 741, 216 N.W.2d 8, 13 (1974).[10] We agree with the Wisconsin Supreme Court's assessment. Scientific developments seem to have made the polygraph more reliable.[11] In addition, science, for better or for worse, has become more a part of our daily lives. Scientific evidence, in turn, has become more a part of the ordinary trial so that jurors may be more likely to use polygraph evidence with [illegible]scretion.[12]

A by-product of Wisconsin's liberal attitude regarding polygraph evidence, however, is that Wisconsin is unable to assert many of the traditional objections to

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[10] The court in *Frye* ruled that scientific evidence, such as the results of a polygraph examination, may not be admitted into evidence unless the test has achieved "general acceptance" in its field. *Frye*, 293 F. at 1014. While often followed by the courts, the *Frye* standard for the admission of scientific evidence has been subjected to considerable criticism. *E.g.*, Giannelli, *The Admissibility of Novel Scientific Evidence*: Frye v. United States, *A Half-Century Later*, 80 Colum. L. Rev. 1197 (1980).

[11] For example, the test given in *Frye* measured only blood pressure while the modern polygraph test records changes in blood pressure, respiration, pulse and galvanic skin response. Even the results of the technologically rudimentary polygraph test held inadmissible in *Frye*, however, were reliable enough to correctly show that an innocent man had been wrongly convicted of murder. Wicker, *The Polygraph Truth Test and the Law of Evidence*, 22 Tenn. L. Rev. 711, 715 (1953).

[12] *United States v. Ridling*, 350 F.Supp. 90, 98 (E.D. Mich. 1972). It is the "conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent

(Footnote continued on following page)

polygraph evidence to sustain the two aspects of the *Stanislawski* stipulation requirement under review here. Other justifications have been argued, however, and we shall now consider the separate justifications asserted for each portion of the stipulation requirement.

A. State Justifications for the Stipulation Requirement

The state justifies the requirement that the district attorney sign a written stipulation to the admission of the results of a polygraph test on the theory that a pretest stipulation[13] increases the reliability of the test itself. Without a pre-test stipulation as to admissibility, the defendant could continue to take successive tests until one finally produced favorable results. The defendant could also take each test secure in the knowledge that the test results would neither be disclosed nor be used against him should they not turn out to be favorable. "This sense of security diminishes the fear of discovered deception, upon which an effective examination depends." *United States v.*

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understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury ...." *Washington v. Texas*, 388 U.S. 14, 22 (1967) (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918)). *See also Jackson v. Garrison*, 495 F. Supp. 9, 11 (W.D. N.C. 1979) (applying this principle to polygraph evidence).

[13] Defendant claims that the Wisconsin rule does not require that the stipulation be entered into prior to the defendant's submission to the test. This is contradicted, however, by a consistent series of comments on this point in the Wisconsin opinions on polygraph evidence. *State v. Schlise*, 86 Wis.2d 26, 42, 271 N.W.2d 619, 626 (1978); *Lhost v. State*, 85 Wis.2d 620, 649, 271 N.W.2d 121, 135 (1978); *Zelenka v. State*, 83 Wis.2d 601, 612, 266 N.W.2d 279, 284 (1978).

Wilson, 361 F. Supp. 510, 514 (D. Md. 1973); *See also United States v. Urquidez*, 356 F. Supp. 1363, 1366 (C.D. Cal. 1973). Academic commentators in the field have also recognized that stipulation requirements heighten the fears of the person undergoing the test about being detected and increase the reliability of the polygraph examination. Orne, *Implications of Laboratory Research for the Detection of Deception*, 2 Polygraph 169, 193-95 (1973); Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 Am. Crim. L. Rev. 29, 35 (1977). Although we have no definitive view on the matter, as a matter of common sense we find this thesis quite reasonable.

Defendant, however, challenges the validity of this hypothesis with the citation of other academic works that reject the hypothesis or have found it unsubstantiated in laboratory tests.[14] As indicated, we do not wish to weigh the empirical evidence on this claim and, indeed, feel less than fully qualified to do so.

> 'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.' Mr. Justice Brandeis, dissenting in New State Ice Co. v. Liebmann, 285 U.S. 262, 311.

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[14] Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 Hastings L.J. 917, 959 & n.207 (1975); D. Raskin, G. Borland and J. Podlesny, *Validity and Reliability of Detection of Deception* at 21 (National Institute of Law Enforcement and Criminal Justice, June 1978). These works do not completely refute the thesis underlying the pre-test stipulation. Tarlow actually notes in another portion of his article that stipulations may indirectly increase the reliabilty of polygraph tests by leading the parties to agree on competent examiners. 26 Hastings L. J. at 956.

Fay v. New York, 332 U.S. 261, 296 (1947). While the matter is open to debate, there is a sufficient possibility of enhancing the reliability of polygraph examinations to support the *Stanislawski* pre-test stipulation requirement.

B. The Prosecutor's Refusal to Enter Into the Stipulation

Our inquiry does not end here, however, for the defendant also challenges the refusal of the prosecutor to enter into the stipulation. An implicit aspect of the *Stanislawski* conditions, as construed in the decisions of the Wisconsin Supreme Court in the instant case and in *Lhost v. State*, 85 Wis.2d 629, 271 N.W.2d 121 (1978), is that the prosecutor has the power to refuse a defendant's offer to stipulate to the admission of the results of a polygraph examination without articulating his reasons. The effect of this rule is to give the prosecutor an unrestricted veto, for any reason or no reason at all, over the use of polygraph evidence by the defendant. An additional deleterious side effect of this policy is that, in the absence of any obligation to justify his refusal, the prosecutor's veto evades meaningful judicial review.

Thus, the prosecutor in the instant case gave no reason for refusing to enter into the offered stipulation. The effect of this refusal was to preclude the defendant's use of the results of a polygraph test under any circumstances. Permitting this kind of refusal invites an abuse of the stipulation requirement. Prosecutors occupy an adversarial role and have adversarial responsibilities. Such untrammeled authority to exclude, without explanation, exculpatory defense evidence must be scrutinized carefully. The potential for abuse of an unrestricted veto is a particular problem in cases like the instant one where the

prosecution has a relatively weak case and polygraph evidence might justifiably alter the outcome.[15]

The sole justification that we can perceive for giving the prosecutor the power to exclude polygraph evidence is to interpose an additional check on the determination that polygraph evidence is sufficiently trustworthy and capable of evaluation by the jury to be admitted in a particular case.[16] Such an additional check can certainly serve valid purposes. For example, the prosecutor may properly refuse to enter into a stipulation because the defendant proposed to use an unqualified examiner or to take the test under conditions not conducive to reliable results. The prosecutor might also justifiably refuse to enter into a stipulation if he has reason to believe that the defendant is "polygraph proof" because he had managed to evade detection of deceptive responses in a previous examination. The right of an accused to present evidence in his defense must still yield to "established rules of procedure and evidence designed

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[15] We must stress that there was no allegation of bad faith on the part of the prosecutor in the instant case. The Wisconsin Supreme Court in fact noted in its unpublished per curiam opinion that the prosecutor had acted in good faith. Good faith is not necessarily the issue, however. The issue is whether the prosecutor's adversarial role, and the tactical decisions attendant to it, are constitutionally compatible with an unexplained and unreviewable veto power.

[16] In *Stanislawski*, the Wisconsin Supreme Court has made the judgment, which we find reasonable, that in most cases properly instructed juries will be able to accord polygraph evidence secured from stipulated examinations its appropriate weight in the trial process. Prior to *Stanislawski*, Wisconsin did not allow even the results of *stipulated* polygraph evidence. *LeFevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943). We assume that in some relatively rare cases the prosecutor might refuse to stipulate to a polygraph examination on the grounds that the particular circumstances of that case would present an especial risk of jury confusion. *See also* note 17, *infra*.

to assure both fairness and reliability in the ascertainment of guilt or innocence." *Chambers*, 410 U.S. at 302. The prosecutor may thus perfectly validly refuse to stipulate when his veto is being used to increase the reliability of the trial process.[17] However, as an adversarial figure, the prosecutor's refusal to enter into a stipulation must be for justifiable reasons. Justifiable reasons in this context are reasons which go to the reliability of the test or to the integrity of the trial process, not reasons which consider merely the relative tactical advantages from the use of the evidence to the prosecution and the defense. To establish this justification, the prosecutor must articulate his reasons and the trial court must have appropriate powers of review.[18]

Although the prosecutor here stated no reasons for his refusal to stipulate to the examination, the Wisconsin Supreme Court felt that the prosecutor's refusal was justified because it prevented "collateral"

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[17] In other circumstances, valid state interests unrelated to the integrity of the trial process might be sufficient to prevent the use of evidence offered by the defendant. *See Washington v. Texas*, 388 U.S. 14, 23 n.21 (1967).

[18] We are not apparently confronted here with the potential case of rejection of all polygraph evidence in all cases by the district attorney of a particular county. Such a situation would not appear to involve refusals by the prosecutor to stipulate "for purely tactical reasons" — the subject of this opinion. Nonetheless, this sort of practice may raise both due process and equal protection problems. *But see State v. Mendoza*, 80 Wis.2d 122, 186, 258 N.W.2d 260, 288 (1977) (Robert W. Hansen, J., dissenting):

> If any district attorney in [Wisconsin] is not convinced of the reliability of polygraph testing, and not similarly convinced of the qualifications of the examiner named to do the testing, there will be and can be no polygraph test results admitted in criminal cases in his county while he he is district attorney. All he has to do is refuse to stipulate to the test being given and the results of the test admitted. If he wants the door locked, he can lock it.

issues surrounding the testimony of an examiner as to the results of a polygraph examination from overly complicating the jury's decision. But, given the facts of the instant case, such a rationalization is simply not persuasive. This was a quite simple case with only one prosecution witness. The collateral issues attendant on the introduction of polygraph evidence would thus seem not to have been too confusing or complex for the jury to digest while, at the same time, retaining their focus on the direct evidence of the defendant's involvement in the crime. The critical importance of the credibility determination in this case also renders the polygraph evidence so material that the very limited potential for confusion from the use of the defendant's polygraph evidence should not be sufficient to block the use of this evidence for unstated and potentially inappropriate reasons. While Wisconsin has reached a contrary conclusion on this question, its judgment as to the precise contours of the stipulation process must still satisfy the Constitution. *See Galloway v. Brewer,* 525 F.2d 369 (8th Cir. 1975), *cert. denied,* 424 U.S. 974 (1976).

We must stress, however, that ultimately our decision is closely linked to the peculiarities of the Wisconsin stipulation rule. The Wisconsin rule is not *solely* a "consent" rule whereby the parties waive the benefit of a rule of evidence barring the introduction of polygraph evidence.[19] Stipulation rules based on consent principles reflect state judgments that polygraph evidence is too unreliable or too capable of

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[19] Admittedly, the Wisconsin rule does have some consensual elements. *See Lhost v. State,* 85 Wis.2d 620, 646, 271 N.W.2d 121, 133-34 (1978). The Wisconsin rule departs from what we describe as the "consent" approach, however, because Wisconsin believes that polygraph evidence admitted pursuant to a *Stanislawski* stipulation is both reliable and capable of informed consideration by the jury.

misinterpretation to be admitted at trial but recognize that the parties may waive their evidentiary objections.[20] *See State v. McNamara,* 252 Iowa 19, 104 N.W.2d 568 (1960). In contrast, as stated in *Lhost v. State,* 85 Wis.2d 620, 646, 271 N.W.2d 121, 133 (1978), "[t]he Wisconsin stipulation rule pronounced in *Stanislawski* is designed to assure the fairness and reliability in the introduction of polygraph results in evidence." Indeed, the change in Wisconsin law allowing the introduction of polygraph testimony rests on the adoption of the premise in *Stanislawski* that polygraph examinations have become more reliable and have achieved such a degree of scientific recognition that their unconditional rejection is no longer appropriate. *Stanislawski,* 62 Wis.2d at 741, 216 N.W.2d at 13. Wisconsin's divergence from the "consent" approach is further illustrated by the fact that both parties may, subsequent to the stipulated examination, contest the admission of the evidence in a pre-admission hearing. *State v. Mendoza,* 80 Wis.2d 122, 258 N.W.2d 260 (1977). Our decision is thus consistent with the philosophy underlying the Wisconsin stipulation requirement.

In essence, therefore, we find the prosecutor's veto of the test in the instant case to be constitutionally impermissible because he stated no reasons which might be reviewed by the trial court. From all that appears, he was acting solely for tactical reasons in

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[20] A state with a "consent" stipulation requirement would be able to assert, as a justification for the exclusion of the evidence, its determination that polygraph evidence is too likely to be misused by the jury. The same justification would be available to support a state rule that absolutely barred the use of polygraph evidence. Of course, we express no opinion on whether this justification would be sufficient to sustain the total exclusion of polygraph testimony. We note these alternatives only to point out the limited scope of this decision.

the belief that a test would not be helpful to his case. If the prosecutor refuses *and states reasons,* it then becomes the duty of the court to determine whether the reasons offered rise above the purely tactical considerations present in a given case. Certainly, no proper state purpose is served by allowing a purely tactical veto power. We do not hold that Wisconsin may not absolutely refuse to admit polygraph evidence, or that a judge may not refuse to admit polygraph evidence in a particular case; we merely hold that it offends due process for the prosecutor, as an adversary, to exercise an unrestricted veto — unrelated on the record to any reasons appropriate to the stipulation requirement — over the significantly exculpatory polygraph evidence in the instant case.

We therefore hold that the refusal of the prosecutor to enter into the stipulation offered here may have violated the petitioner's right to be tried in accordance with the due process clause. We remand this action to the district court, however, for further proceedings to assess whether the prosecutor had valid reasons for refusing to enter into the stipulation offered by the defendant. If the refusal was unjustified,[21] the petition for writ of habeas corpus should be granted.[22]

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[21] Even if the prosecutor argues that his refusal was based on otherwise justifiable reasons such as the failure of the defendant to propose using a qualified examiner, the district court should grant the writ of habeas corpus unless it determines that the defendant

(Footnote continued on following page)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 7, 1981.

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

[*order continued*]

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would have been unable to cure the objection had he been informed of it prior to the Wisconsin trial. Obviously, this problem is unique to the instant case and would presumably not be involved in future cases.

[22] In the event that Wisconsin would subject petitioner to another trial, the results of the polygraph examination taken by the defendant after his conviction in state court would not be admissible under *Stanislawski* because there was no pretest stipulation. The defendant would have the opportunity, of course, to seek a stipulation as to a future polygraph examination. It would be unfair under the particular circumstances of this case, however, for the petitioner to be denied any opportunity to take a new polygraph examination pursuant to a *Stanislawski* stipulation because of the asserted effect of the earlier examination upon the reliability of the subsequent examination. *See Lhost v. State*, 85 Wis.2d 620, 643 n.14, 271 N.W.2d 121, 132 n.14 (1978). Although we refrain from evaluating this alleged effect, we doubt that it is present where nearly five years have passed since the first examination.

DARREL McMORRIS,
Petitioner-Appellant,

vs.

THOMAS ISRAEL and BRONSON C. LaFOLLETTE,
Respondents-Appellees.

Nos. 79-2285 and 80-1568

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 79-C-325
Robert W. Warren, *Judge.*

ORDER

This case is before the court on a petition for rehearing and suggestion for rehearing *en banc* filed by the Respondents-Appellees.

The original opinion issued by this court on March 9, 1981, is modified by inserting, between *"See"* and *"Lhost"* in line 2 of note 19, the following:

> *State v. Craft*, 99 Wis. 2d 128, 134, 298 N.W. 2d 530, 532 (1980);

The opinion is further modified by adding, after "jury" in line 7 of note 19, the following:

> While Wisconsin is justifiably reluctant to admit the results of *unstipulated* polygraph examinations, *see supra* at 9-11, it adopted in *Stanislawski* a much more positive approach with respect to the results of examinations conducted under conditions established pur-

suant to pre-test stipulations. The fundamental shift accomplished by *Stanislawski* is demonstrated by the fact that, before *Stanislawski*, even stipulated examinations were deemed incompetent. *See* note 16, *supra*. Characterizing the stipulation as a "waiver", *see Craft*, 99 Wis. 2d at 134, 298 N.W. 2d at 532, does not affect the thesis underlying *Stanislawski* that the results of stipulated polygraph examinations are competent evidence; the "waiver" consists in the agreement of the parties to forego otherwise potentially valid objections to the admission of the results of the examination such as, for example, that the examiner was not qualified. The evidence is inadmissible in the absence of the stipulation because it is not sufficiently reliable without the stipulation. *Lhost*, 85 Wis. 2d at 645, 271 N.W. 2d at 133. This approach does not mean that Wisconsin is a pure "consent" state (where stipulated polygraph evidence, even if admitted, would not be regarded as competent).

The opinion is further modified by inserting, between "case" and the superscript "16" in line 8 of page 12, the following:

> *Robinson v. State*, 100 Wis. 2d 152, 162, 301 N.W. 2d 429, 434 (1981).

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled matter by counsel for the Respondents-Appellees, a vote of the active members of the court was requested, and less than a majority of the active members of the court have voted to grant a hearing *en*

*banc.** All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DARREL McMORRIS,
Petitioner,

vs. Case No. 79-C-325

THOMAS ISRAEL and
BRONSON C. LA FOLLETTE,

Respondents.

MEMORANDUM AND ORDER

The petitioner, Darrel McMorris, has filed a request for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 31, 1979, the Court granted the petitioner leave to proceed in forma pauperis and ordered the respondents to file a response to the petition. The Court also gave the petitioner twenty days to file a traverse to the answer. The time having lapsed, the Court now has before it the petition, the response and copies of the briefs filed by both parties when this action was on appeal to the Wisconsin Supreme Court.

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*Circuit Judges Pell, Sprecher, Bauer and Wood voted to grant the petition for rehearing *en banc*.

On April 14, 1976, petitioner was convicted in a jury trial in the County Court for Racine County for strong-armed robbery in violation of Wis. Stat. § 943.32(1) (a). The county court judge sentenced the petitioner to an indeterminate term of not more than five years at the Wisconsin State Reformatory at Green Bay. After sentencing the petitioner filed a motion for a new trial which was denied. On October 31, 1978, the Wisconsin Supreme Court affirmed his conviction. The issue raised on appeal and at the hearing on the motion for a new trial was identical to the one the petitioner raises now. The Court, therefore, finds that with respect to the issue raised here, the petitioner has exhausted his state remedies.

The petitioner alleges he is entitled to a writ of habeas corpus because the prosecutor refused to enter into a stipulation for the admission of the results of a polygraph examination prior to his trial.

The facts of this case are undisputed. Prior to the petitioner's trial, his attorney attempted to enter into a stipulation with the prosecutor for the admission of polygraph results. The prosecutor, however, refused to approve the stipulation and the case proceeded to trial. At trial, the prosecutor called only one witness, the alleged victim. The victim testified that he had been mugged and robbed on the morning of November 14, 1975, at approximately 6:00 A.M. The witness also identified the petitioner as his assailant. On cross examination, the witness was unable to give a description of his assailant. Furthermore, he testified that he had never seen the petitioner before and that at the time of the incident, it was cold and dark. Finally, the witness conceded that the whole incident happened very quickly.

The defendant also took the stand and testified that he had never seen the victim prior to the initiation of the case and that he had not robbed the

victim. At no time during the trial did the petitioner request that he be allowed to introduce the results of a polygraph examination into evidence.

After conviction, the petitioner filed a motion for a new trial alleging that he had been denied due process of law because of the prosecutor's refusal to stipulate to the admission of the polygraph results. A hearing was held on the motion at which time the petitioner offered evidence that he had taken a polygraph test subsequent to the trial. According to the expert who administered the test, the results indicated that the petitioner was telling the truth regarding the armed robbery. The petitioner's expert also testified as to the accuracy of the examination as well as its scientific basis. The court denied the motion and the petitioner subsequently appealed the case to the Wisconsin Supreme Court on the same grounds.

The issue presented the Wisconsin Supreme Court was whether its rule in *State v. Stanislawski,* 62 Wis.2d 730 (1976) violated the defendant's right to present a witness in his defense. *See Chambers v. Mississippi,* 410 U.S. 284 (1972). In *Stanislawski, supra,* the Court established four prerequisites to the use of a polygraph test at a trial: (1) the prosecutor and the defense counsel must enter a written stipulation of the use of the results; (2) the trial judge must approve the admissibility of the evidence regardless of the stipulation; (3) the opposing party may cross examine the expert regarding matters pertinent to the examination and his qualifications; and (4) the jury must be instructed as to the weight and effect of the evidence. *Id.* at 742-43. The petitioner asked the Court to reconsider the first requirement of the test. The petitioner contended that because the only evidence regarding the robbery that the jury had before them was his statement and the alleged victim's that the Fifth Amendment required he be able to introduce

evidence of the polygraph test to corroborate his testimony.

In their brief to the Wisconsin Supreme Court, both parties fully discussed the current controversy surrounding the admissibility of polygraph evidence at trial as well as the question of whether its exclusion violated due process. The Wisconsin Supreme Court held in an unpublished per curiam opinion that the prosecutor's "refusal to stipulate to the admissibility of a polygraph examination is not a denial of due process." *McMorriss* [sic] *v. State of Wisconsin*, 77-145-CR (October 31, 1978). The Court also cited with approval a case decided the same day which dealt with the same issue. *Id.*

In *Lnost v. State of Wisconsin*, — Wis.2d —, 271 N.W.2d 121 (1978), the court thoroughly reviewed the evidence both in favor and against the reliability of polygraph exams. The court concluded that "[t]he results of authorative studies are in as sharp dispute today as they were when *Stanislawski* was written in 1974." *Id.* at 131. The court also discussed the applicability of the holding in *Washington v. Texas*, 388 U.S. 14 (1967) and *Chambers v. Mississippi, supra*, to this case. The Court held:

> *Washington v. Texas, supra,* and *Chambers v. Mississippi, supra,* do not stand for the proposition that inherently unreliable evidence or evidence of questionable validity must be admitted into evidence as part of the defendant's right to compulsory process. In fact, to the contrary, in each case the court undertook an analysis to establish the reliability of the excluded testimony and then weigh the reliability and necessity for such evidence against the state's interest in its exclusion. *Washington* and *Chambers* do not mandate the admissibility of polygraph results without

stipulation if this court finds the polygraph is not sufficiently reliable in the absence of a stipulation. *Id.* at 130.

The federal courts that have ruled on this issue in some form have reached divergent results yet the majority supports the view of the Wisconsin court.

In *United States v. Masri,* 547 F.2d 932, 936 (5th Cir.) *cert. denied,* 434 U.S. 907 (1977), the Court upheld that circuit's rule against the use of polygraph results in federal criminal cases. The second and eighth circuits have considered the same question addressed by the court today. *United States ex rel Sadowy v. Fay,* 284 F.2d 426 (2nd Cir. 1960) *cert. denied,* 365 U.S. 850 (1961) and *Conner v. Auger,* 595 F.2d 407 (1979). In both cases the courts affirmed the state procedure requiring a stipulation before the admission of polygraph results. Although the decisions are several years apart, both courts concluded that a stipulation could be required because of the continuing question of the reliability of the polygraph results.

The Seventh Circuit has not precisely decided this question but has held that the admission of polygraph results in a federal case is within the discretion of the trial judge. *United States v. Infelice,* 506 F.2d 1358 (7th Cir. 1974) *cert. denied,* 419 U.S. 1101 (1975). At least one district court in this circuit has addressed the same issue as in this case and held that the constitutional rights of a defendant are not violated by a stipulation requirement. *Fletcher v. Lane,* 466 F. Supp. 729, 731 (S.D. Ill. 1978).

A minority of courts have determined that polygraph evidence is admissible in a criminal case without a stipulation. The courts that have done so have based their holding on their belief in the reliability of the polygraph's results. *See United States v. Ridling,* 358 F. Supp. 90 (E.D. Mich. 1970) and *State*

v. Dorsey, 87 N.M. 323, 532 P.2d 912, *aff'd* 88 N.M. 284, 539 P.2d 204 (1975).

Based on the evidence before the Court regarding the reliability of the polygraph results, this Court is unconvinced that these are sufficiently reliable to be admitted without a stipulation. A stipulation and the other procedures required by the *Stawislawski* decision insures greater reliability and that the polygraph evidence will be given its proper weight if admitted.

Because of the continuing controversy surrounding the reliability of the polygraph, this Court finds that the petitioner was not denied due process of law by the refusal of the prosecutor to stipulate to the admissibility of the polygraph results. Therefore, the petition for a writ of habeas corpus must be and is hereby denied.

SO ORDERED this *28th* day of August, 1979, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DARREL McMORRIS,

Petitioner,

vs. Case No. 79-C-325

THOMAS ISRAEL and
BRONSON C. LaFOLLETTE,

Respondents.

MEMORANDUM AND ORDER

On August 28, 1979, this Court denied petitioner's motion for a writ of *habeas corpus*. The Court held that the Wisconsin rule requiring stipulation between the prosecutor and a defendant prior to the admissibility of the results of a polygraph examination does not violate a defendant's constitutional rights.

On September 5, 1979, the petitioner's attorney informed the Court by letter that he had intended to submit supplemental material prior to the Court's decision on the merits in this matter. Because petitioner's attorney failed to inform the Court of his intentions prior to the decision on the merits, the Court *sua sponte* treated the petitioner's letter as a request for reconsideration and established a briefing schedule on the motion. On September 25, 1979, the petitioner filed a notice of appeal in this action and subsequently the Court issued a certificate of probable cause.

Before considering the motion for reconsideration and in light of the appeal by petitioner, the Court must first determine whether it has jurisdiction to hear this matter. There are three different rules under which this Court might treat petitioner's letter. Under Rules 52(b) and 59 of the Federal Rules of Civil Procedure, a party may move to amend a court's finding of facts or a

to assure both fairness and reliability in the ascertainment of guilt or innocence." *Chambers*, 410 U.S. at 302. The prosecutor may thus perfectly validly refuse to stipulate when his veto is being used to increase the reliability of the trial process.[17] However, as an adversarial figure, the prosecutor's refusal to enter into a stipulation must be for justifiable reasons. Justifiable reasons in this context are reasons which go to the reliability of the test or to the integrity of the trial process, not reasons which consider merely the relative tactical advantages from the use of the evidence to the prosecution and the defense. To establish this justification, the prosecutor must articulate his reasons and the trial court must have appropriate powers of review.[18]

Although the prosecutor here stated no reasons for his refusal to stipulate to the examination, the Wisconsin Supreme Court felt that the prosecutor's refusal was justified because it prevented "collateral"

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[17] In other circumstances, valid state interests unrelated to the integrity of the trial process might be sufficient to prevent the use of evidence offered by the defendant. *See Washington v. Texas*, 388 U.S. 14, 23 n.21 (1967).

[18] We are not apparently confronted here with the potential case of rejection of all polygraph evidence in all cases by the district attorney of a particular county. Such a situation would not appear to involve refusals by the prosecutor to stipulate "for purely tactical reasons" — the subject of this opinion. Nonetheless, this sort of practice may raise both due process and equal protection problems. *But see State v. Mendoza*, 80 Wis.2d 122, 186, 258 N.W.2d 260, 288 (1977) (Robert W. Hansen, J., dissenting):

> If any district attorney in [Wisconsin] is not convinced of the reliability of polygraph testing, and not similarly convinced of the qualifications of the examiner named to do the testing, there will be and can be no polygraph test results admitted in criminal cases in his county while he he is district attorney. All he has to do is refuse to stipulate to the test being given and the results of the test admitted. If he wants the door locked, he can lock it.

issues surrounding the testimony of an examiner as to the results of a polygraph examination from overly complicating the jury's decision. But, given the facts of the instant case, such a rationalization is simply not persuasive. This was a quite simple case with only one prosecution witness. The collateral issues attendant on the introduction of polygraph evidence would thus seem not to have been too confusing or complex for the jury to digest while, at the same time, retaining their focus on the direct evidence of the defendant's involvement in the crime. The critical importance of the credibility determination in this case also renders the polygraph evidence so material that the very limited potential for confusion from the use of the defendant's polygraph evidence should not be sufficient to block the use of this evidence for unstated and potentially inappropriate reasons. While Wisconsin has reached a contrary conclusion on this question, its judgment as to the precise contours of the stipulation process must still satisfy the Constitution. *See Galloway v. Brewer*, 525 F.2d 369 (8th Cir. 1975), *cert. denied*, 424 U.S. 974 (1976).

We must stress, however, that ultimately our decision is closely linked to the peculiarities of the Wisconsin stipulation rule. The Wisconsin rule is not *solely* a "consent" rule whereby the parties waive the benefit of a rule of evidence barring the introduction of polygraph evidence.[19] Stipulation rules based on consent principles reflect state judgments that polygraph evidence is too unreliable or too capable of

[19] Admittedly, the Wisconsin rule does have some consensual elements. *See Lhost v. State*, 85 Wis.2d 620, 646, 271 N.W.2d 121, 133-34 (1978). The Wisconsin rule departs from what we describe as the "consent" approach, however, because Wisconsin believes that polygraph evidence admitted pursuant to a *Stanislawski* stipulation is both reliable and capable of informed consideration by the jury.

misinterpretation to be admitted at trial but recognize that the parties may waive their evidentiary objections.[20] *See State v. McNamara,* 252 Iowa 19, 104 N.W.2d 568 (1960). In contrast, as stated in *Lhost v. State,* 85 Wis.2d 620, 646, 271 N.W.2d 121, 133 (1978), "[t]he Wisconsin stipulation rule pronounced in *Stanislawski* is designed to assure the fairness and reliability in the introduction of polygraph results in evidence." Indeed, the change in Wisconsin law allowing the introduction of polygraph testimony rests on the adoption of the premise in *Stanislawski* that polygraph examinations have become more reliable and have achieved such a degree of scientific recognition that their unconditional rejection is no longer appropriate. *Stanislawski,* 62 Wis.2d at 741, 216 N.W.2d at 13. Wisconsin's divergence from the "consent" approach is further illustrated by the fact that both parties may, subsequent to the stipulated examination, contest the admission of the evidence in a pre-admission hearing. *State v. Mendoza,* 80 Wis.2d 122, 258 N.W.2d 260 (1977). Our decision is thus consistent with the philosophy underlying the Wisconsin stipulation requirement.

In essence, therefore, we find the prosecutor's veto of the test in the instant case to be constitutionally impermissible because he stated no reasons which might be reviewed by the trial court. From all that appears, he was acting solely for tactical reasons in

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[20] A state with a "consent" stipulation requirement would be able to assert, as a justification for the exclusion of the evidence, its determination that polygraph evidence is too likely to be misused by the jury. The same justification would be available to support a state rule that absolutely barred the use of polygraph evidence. Of course, we express no opinion on whether this justification would be sufficient to sustain the total exclusion of polygraph testimony. We note these alternatives only to point out the limited scope of this decision.

the belief that a test would not be helpful to his case. If the prosecutor refuses *and states reasons,* it then becomes the duty of the court to determine whether the reasons offered rise above the purely tactical considerations present in a given case. Certainly, no proper state purpose is served by allowing a purely tactical veto power. We do not hold that Wisconsin may not absolutely refuse to admit polygraph evidence, or that a judge may not refuse to admit polygraph evidence in a particular case; we merely hold that it offends due process for the prosecutor, as an adversary, to exercise an unrestricted veto — unrelated on the record to any reasons appropriate to the stipulation requirement — over the significantly exculpatory polygraph evidence in the instant case.

We therefore hold that the refusal of the prosecutor to enter into the stipulation offered here may have violated the petitioner's right to be tried in accordance with the due process clause. We remand this action to the district court, however, for further proceedings to assess whether the prosecutor had valid reasons for refusing to enter into the stipulation offered by the defendant. If the refusal was unjustified,[21] the petition for writ of habeas corpus should be granted.[22]

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[21] Even if the prosecutor argues that his refusal was based on otherwise justifiable reasons such as the failure of the defendant to propose using a qualified examiner, the district court should grant the writ of habeas corpus unless it determines that the defendant

(Footnote continued on following page)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 7, 1981.

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

[*order continued*]

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would have been unable to cure the objection had he been informed of it prior to the Wisconsin trial. Obviously, this problem is unique to the instant case and would presumably not be involved in future cases.

[22] In the event that Wisconsin would subject petitioner to another trial, the results of the polygraph examination taken by the defendant after his conviction in state court would not be admissible under *Stanislawski* because there was no pretest stipulation. The defendant would have the opportunity, of course, to seek a stipulation as to a future polygraph examination. It would be unfair under the particular circumstances of this case, however, for the petitioner to be denied any opportunity to take a new polygraph examination pursuant to a *Stanislawski* stipulation because of the asserted effect of the earlier examination upon the reliability of the subsequent examination. *See Lhost v. State*, 85 Wis.2d 620, 643 n.14, 271 N.W.2d 121, 132 n.14 (1978). Although we refrain from evaluating this alleged effect, we doubt that it is present where nearly five years have passed since the first examination.

DARREL McMORRIS,
Petitioner-Appellant,

vs.

THOMAS ISRAEL and BRONSON C. LaFOLLETTE,
Respondents-Appellees.

Nos. 79-2285 and 80-1568

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 79-C-325
Robert W. Warren, *Judge.*

ORDER

This case is before the court on a petition for rehearing and suggestion for rehearing *en banc* filed by the Respondents-Appellees.

The original opinion issued by this court on March 9, 1981, is modified by inserting, between *"See"* and *"Lhost"* in line 2 of note 19 the following:

> *State v. Craft*, 99 Wis. 2d 128, 134, 298 N.W. 2d 530, 532 (1980);

The opinion is further modified by adding, after "jury" in line 7 of note 19, the following:

> While Wisconsin is justifiably reluctant to admit the results of *unstipulated* polygraph examinations, *see supra* at 9-11, it adopted in *Stanislawski* a much more positive approach with respect to the results of examinations conducted under conditions established pur-

suant to pre-test stipulations. The fundamental shift accomplished by *Stanislawski* is demonstrated by the fact that, before *Stanislawski*, even stipulated examinations were deemed incompetent. *See* note 16, *supra*. Characterizing the stipulation as a "waiver", *see Craft*, 99 Wis. 2d at 134, 298 N.W. 2d at 532, does not affect the thesis underlying *Stanislawski* that the results of stipulated polygraph examinations are competent evidence; the "waiver" consists in the agreement of the parties to forego otherwise potentially valid objections to the admission of the results of the examination such as, for example, that the examiner was not qualified. The evidence is inadmissible in the absence of the stipulation because it is not sufficiently reliable without the stipulation. *Lhost*, 85 Wis. 2d at 645, 271 N.W. 2d at 133. This approach does not mean that Wisconsin is a pure "consent" state (where stipulated polygraph evidence, even if admitted, would not be regarded as competent).

The opinion is further modified by inserting, between "case" and the superscript "16" in line 8 of page 12, the following:

> *Robinson v. State*, 100 Wis. 2d 152, 162, 301 N.W. 2d 429, 434 (1981).

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled matter by counsel for the Respondents-Appellees, a vote of the active members of the court was requested, and less than a majority of the active members of the court have voted to grant a hearing *en*

*banc.** All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DARREL McMORRIS,
Petitioner,

vs. Case No. 79-C-325

THOMAS ISRAEL and
BRONSON C. LA FOLLETTE,

Respondents.

MEMORANDUM AND ORDER

The petitioner, Darrel McMorris, has filed a request for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 31, 1979, the Court granted the petitioner leave to proceed in forma pauperis and ordered the respondents to file a response to the petition. The Court also gave the petitioner twenty days to file a traverse to the answer. The time having lapsed, the Court now has before it the petition, the response and copies of the briefs filed by both parties when this action was on appeal to the Wisconsin Supreme Court.

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*Circuit Judges Pell, Sprecher, Bauer and Wood voted to grant the petition for rehearing *en banc*.

On April 14, 1976, petitioner was convicted in a jury trial in the County Court for Racine County for strong-armed robbery in violation of Wis. Stat. § 943.32(1) (a). The county court judge sentenced the petitioner to an indeterminate term of not more than five years at the Wisconsin State Reformatory at Green Bay. After sentencing the petitioner filed a motion for a new trial which was denied. On October 31, 1978, the Wisconsin Supreme Court affirmed his conviction. The issue raised on appeal and at the hearing on the motion for a new trial was identical to the one the petitioner raises now. The Court, therefore, finds that with respect to the issue raised here, the petitioner has exhausted his state remedies.

The petitioner alleges he is entitled to a writ of habeas corpus because the prosecutor refused to enter into a stipulation for the admission of the results of a polygraph examination prior to his trial.

The facts of this case are undisputed. Prior to the petitioner's trial, his attorney attempted to enter into a stipulation with the prosecutor for the admission of polygraph results. The prosecutor, however, refused to approve the stipulation and the case proceeded to trial. At trial, the prosecutor called only one witness, the alleged victim. The victim testified that he had been mugged and robbed on the morning of November 14, 1975, at approximately 6:00 A.M. The witness also identified the petitioner as his assailant. On cross examination, the witness was unable to give a description of his assailant. Furthermore, he testified that he had never seen the petitioner before and that at the time of the incident, it was cold and dark. Finally, the witness conceded that the whole incident happened very quickly.

The defendant also took the stand and testified that he had never seen the victim prior to the initiation of the case and that he had not robbed the

victim. At no time during the trial did the petitioner request that he be allowed to introduce the results of a polygraph examination into evidence.

After conviction, the petitioner filed a motion for a new trial alleging that he had been denied due process of law because of the prosecutor's refusal to stipulate to the admission of the polygraph results. A hearing was held on the motion at which time the petitioner offered evidence that he had taken a polygraph test subsequent to the trial. According to the expert who administered the test, the results indicated that the petitioner was telling the truth regarding the armed robbery. The petitioner's expert also testified as to the accuracy of the examination as well as its scientific basis. The court denied the motion and the petitioner subsequently appealed the case to the Wisconsin Supreme Court on the same grounds.

The issue presented the Wisconsin Supreme Court was whether its rule in *State v. Stanislawski,* 62 Wis.2d 730 (1976) violated the defendant's right to present a witness in his defense. *See Chambers v. Mississippi,* 410 U.S. 284 (1972). In *Stanislawski, supra,* the Court established four prerequisites to the use of a polygraph test at a trial: (1) the prosecutor and the defense counsel must enter a written stipulation of the use of the results; (2) the trial judge must approve the admissibility of the evidence regardless of the stipulation; (3) the opposing party may cross examine the expert regarding matters pertinent to the examination and his qualifications; and (4) the jury must be instructed as to the weight and effect of the evidence. *Id.* at 742-43. The petitioner asked the Court to reconsider the first requirement of the test. The petitioner contended that because the only evidence regarding the robbery that the jury had before them was his statement and the alleged victim's that the Fifth Amendment required he be able to introduce

evidence of the polygraph test to corroborate his testimony.

In their brief to the Wisconsin Supreme Court, both parties fully discussed the current controversy surrounding the admissibility of polygraph evidence at trial as well as the question of whether its exclusion violated due process. The Wisconsin Supreme Court held in an unpublished per curiam opinion that the prosecutor's "refusal to stipulate to the admissibility of a polygraph examination is not a denial of due process." *McMorriss* [sic] *v. State of Wisconsin*, 77-145-CR (October 31, 1978). The Court also cited with approval a case decided the same day which dealt with the same issue. *Id.*

In *Lhost v. State of Wisconsin*, — Wis.2d —, 271 N.W.2d 121 (1978), the court thoroughly reviewed the evidence both in favor and against the reliability of polygraph exams. The court concluded that "[t]he results of authorative studies are in as sharp dispute today as they were when *Stanislawski* was written in 1974." *Id.* at 131. The court also discussed the applicability of the holding in *Washington v. Texas*, 388 U.S. 14 (1967) and *Chambers v. Mississippi, supra*, to this case. The Court held:

> *Washington v. Texas, supra,* and *Chambers v. Mississippi, supra,* do not stand for the proposition that inherently unreliable evidence or evidence of questionable validity must be admitted into evidence as part of the defendant's right to compulsory process. In fact, to the contrary, in each case the court undertook an analysis to establish the reliability of the excluded testimony and then weigh the reliability and necessity for such evidence against the state's interest in its exclusion. *Washington* and *Chambers* do not mandate the admissibility of polygraph results without

stipulation if this court finds the polygraph is not sufficiently reliable in the absence of a stipulation. *Id.* at 130.

The federal courts that have ruled on this issue in some form have reached divergent results yet the majority supports the view of the Wisconsin court.

In *United States v. Masri,* 547 F.2d 932, 936 (5th Cir.) *cert. denied,* 434 U.S. 907 (1977), the Court upheld that circuit's rule against the use of polygraph results in federal criminal cases. The second and eighth circuits have considered the same question addressed by the court today. *United States ex rel Sadowy v. Fay,* 284 F.2d 426 (2nd Cir. 1960) *cert. denied,* 365 U.S. 850 (1961) and *Conner v. Auger,* 595 F.2d 407 (1979). In both cases the courts affirmed the state procedure requiring a stipulation before the admission of polygraph results. Although the decisions are several years apart, both courts concluded that a stipulation could be required because of the continuing question of the reliability of the polygraph results.

The Seventh Circuit has not precisely decided this question but has held that the admission of polygraph results in a federal case is within the discretion of the trial judge. *United States v. Infelice,* 506 F.2d 1358 (7th Cir. 1974) *cert. denied,* 419 U.S. 1101 (1975). At least one district court in this circuit has addressed the same issue as in this case and held that the constitutional rights of a defendant are not violated by a stipulation requirement. *Fletcher v. Lane,* 466 F. Supp. 729, 731 (S.D. Ill. 1978).

A minority of courts have determined that polygraph evidence is admissible in a criminal case without a stipulation. The courts that have done so have based their holding on their belief in the reliability of the polygraph's results. *See United States v. Ridling,* 358 F. Supp. 90 (E.D. Mich. 1970) and *State*

v. Dorsey, 87 N.M. 323, 532 P.2d 912, *aff'd* 88 N.M. 284, 539 P.2d 204 (1975).

Based on the evidence before the Court regarding the reliability of the polygraph results, this Court is unconvinced that these are sufficiently reliable to be admitted without a stipulation. A stipulation and the other procedures required by the *Stawislawski* decision insures greater reliability and that the polygraph evidence will be given its proper weight if admitted.

Because of the continuing controversy surrounding the reliability of the polygraph, this Court finds that the petitioner was not denied due process of law by the refusal of the prosecutor to stipulate to the admissibility of the polygraph results. Therefore, the petition for a writ of habeas corpus must be and is hereby denied.

SO ORDERED this *28th* day of August, 1979, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DARREL McMORRIS,

Petitioner,

vs. Case No. 79-C-325

THOMAS ISRAEL and
BRONSON C. LaFOLLETTE,

Respondents.

MEMORANDUM AND ORDER

On August 28, 1979, this Court denied petitioner's motion for a writ of *habeas corpus*. The Court held that the Wisconsin rule requiring stipulation between the prosecutor and a defendant prior to the admissibility of the results of a polygraph examination does not violate a defendant's constitutional rights.

On September 5, 1979, the petitioner's attorney informed the Court by letter that he had intended to submit supplemental material prior to the Court's decision on the merits in this matter. Because petitioner's attorney failed to inform the Court of his intentions prior to the decision on the merits, the Court *sua sponte* treated the petitioner's letter as a request for reconsideration and established a briefing schedule on the motion. On September 25, 1979, the petitioner filed a notice of appeal in this action and subsequently the Court issued a certificate of probable cause.

Before considering the motion for reconsideration and in light of the appeal by petitioner, the Court must first determine whether it has jurisdiction to hear this matter. There are three different rules under which this Court might treat petitioner's letter. Under Rules 52(b) and 59 of the Federal Rules of Civil Procedure, a party may move to amend a court's finding of facts or a

judgment respectively within ten days of the date of the entry of judgment. In this case, the Court could treat the petitioner's motion under either rule because the letter was received within the ten day period from the time judgment was entered. The Court could also treat the letter as a motion under Rule 60 (b) of the Federal Rules of Civil Procedure which allows the Court to grant relief from judgment due to mistake, inadvertence, or excusable neglect or for other just causes. Rule 60(b) (1) and (6), F.R.C.P. Because Rule 60(b) (1) appears to be most appropriate for the circumstances of this case, the Court shall treat the motion for reconsideration under rule 60(b).

Having determined that rule 60(b) is the appropriate rule to base petitioner's motion for reconsideration, the Court must still ascertain if the appeal by petitioner in this matter divests the Court of jurisdiction. Respondents argue that the appeal does divest the Court of any jurisdiction it might have had prior to the appeal. Respondents contend that the filing of the appeal vested jurisdiction in the court of appeals and, therefore, this Court cannot act without the Seventh Circuit's prior consent. *Asher v. Harrington,* 461 F.2d 890, 895 (7th Cir. 1972). In addition, the respondents also assert that the case does not fall within any of the recognized exceptions to the *Asher* rule. In *Washington v. Board of Education,* 498 F.2d 11, 16 (7th Cir. 1974), the court held that a district court had jurisdiction to consider a rule 60(b) motion when the law upon which the district court had relied changed during the pendency of the appeal. The Seventh Circuit has also held that a district court has jurisdiction to reconsider a matter when new evidence has been produced. *Binks Manufacturing Co. v. Ransburg Electro-Coating Corporation,* 281 F.2d 252, 261 (7th Cir. 1960).

Petitioner, in response, relies on two cases from this district wherein Judge Reynolds considered the

questions of the Court's jurisdiction to hear a matter pursuant to rule 60(b) while an appeal is pending. In *Redden v. Gray,* 427 F. Supp. 386 (E.D. Wis. 1977), Judge Reynolds held the Court had jurisdiction to hear a rule 60(b) motion when the case was on appeal. That case, however, fell squarely within the exception outlined in *Washington v. Board of Education,* 498 F.2d 11 (7th Cir. 1974). A case more on point, however, is *Holmes v. Israel,* No. 77-C-247 (E.D. Wis. June 27, 1979). In that case, Judge Reynolds held that the district court did not have jurisdiction because the case was pending on appeal and there was no question of a change in the law during the pendency of the appeal or new evidence which might give the court jurisdiction. Nevertheless, Judge Reynolds held that the court could "consider the merits of the motion and indicate what its decision on the motion would be, and the petitioner may thereafter, if the court's indication is favorable, request a remand of the action from the Court of Appeals." *Id.* at 1.

Although *Holmes* represents a liberal reading of *Washington v. Board of Education, supra,* the opinion is consistent with the rational [sic] expressed in *Washington.* The procedure adopted in *Holmes* will prevent the needless waste of time and money for an appeal if the district court determines that the rule 60 (b) motion before it has merit. Because of the concern for judicial economy and efficiency, the Court joins with the *Holmes* court in holding that it may consider the merits of a rule 60 (b) motion and indicate what its opinion would be if the Court had jurisdiction to decide the matter.

Petitioner asserts that the Court should reconsider its original opinion because the stipulation requirement does not insure that polygraph evidence will be admissible. In a series of recent cases, the Wisconsin Supreme Court has held that, in spite of the stipula-

tion, the parties are still entitled to challenge the admissibility and reliability of the polygraph results. In *State v. Mendoza,* 80 Wis.2d 122, 258 N.W.2d 260 (1977), the Wisconsin court held that a defendant who has stipulated to the admissibility of polygraph results is entitled to challenge the results by presenting expert testimony at an admissibility hearing outside the presence of the jury. *Id.* at 161-62.

In *McLemore v. State,* 87 Wis.2d 739, 275 N.W.2d 692 (1979), the Wisconsin court extended *Mendoza* by declaring that a defendant's right to call experts to dispute the polygraph results at an admissibility hearing was not subject to the trial judge's discretion. The right is absolute in Wisconsin. *McLemore v. State,* 87 Wis.2d at 749.

Finally, in *State v. Streich,* 87 Wis.2d 209, 274 N.W.2d 635 (1979), the court stretched its holding in *State v. Stanislawski,* 62 Wis.2d 730, 216 N.W.2d 8 (1974) to allow an oral stipulation rather than a written one as originally required by *Stanislawski.* 87 Wis.2d at 219-20. The court emphasized however, that the *Stanislawski* procedure is the rule in Wisconsin and should be followed by the trial courts. *Id.* at 220.

Petitioner contends these cases demonstrate that the stipulation requirement is not necessary in Wisconsin any more because it has little impact on the final admissibility of evidence. Petitioner contends that in cases such as this one, the stipulation requirement permits the prosecutor to keep out highly relevant evidence. Petitioner argues that the pretrial admissibility hearing affords an adequate basis for determining the reliability of the evidence and, therefore, the stipulation is unwarranted. Petitioner further alleges the stipulation requirement works a particular hardship where, as in this case, the trial judge, after conducting what was in essence a *Stanislawski* admissibility hearing, determined that the evidence was relevant and reliable.

Finally, petitioner urges this Court to follow the decision of the Seventh Circuit in *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir. 1978) where the court struck down the Wisconsin rule against the admissibility of psychiatric evidence in criminal trials on the question of intent. There the court found that Wisconsin considered psychiatric evidence highly relevant and competent in many different stages of criminal prosecutions and, therefore, to exclude it on the issue of intent without justification was unconstitutional. *Id.* at 1258-59.

Although at first glance *Hughes v. Mathews, supra,* appears anaologous [sic] to the present case, it is clearly distinguishable. In *Hughes,* the court found that Wisconsin had allowed psychiatric testimony on many different issues in criminal cases and considered it very reliable and competent evidence. The same cannot be said for polygraph evidence. In fact, members of the Wisconsin Supreme Court have continued to express their doubts as to the reliability and competency of polygraph evidence. *McLemore v. State,* 87 Wis.2d at 749-51.

Having considered the arguments of petitioner, the Court is not persuaded that the stipulation requirement of *Stanislawski* is constitutionally infirm. Proceeding from the premise that the state is free, if it chooses, to exclude polygraph evidence completely, *United States v. Masri,* 547 F.2d 932 (5th Cir), *cert. denied,* 434 U.S. 907 (1977), it is clear that because the reliability of polygraph results generally is still an open question both in Wisconsin and elsewhere, the state is also free to place whatever restrictions on its admissibility it decides are necessary. As defendants correctly assert, it is a basic principal of our federal system that the state be allowed to experiment in the development of their own methods of administering justice. *See Patterson v. New York,* 432 U.S. 197 (1977). Such

experimentation is to be encouraged providing it comports with the fundamental principles of due process and justice.

Based on the eivdence [sic] before it, the Court finds that the stipulation rule of *Stanislawski* does not violate any constitutional rights of the accused and this Court would, therefore, deny the petitioner's request for reconsideration. The Court notes, although it would not have jurisdiction at this time to vacate its judgment, many courts have held that a district court has the authority to deny a motion for reconsideration. *Pioneer Ins. Co. v. Gelt,* 558 F.2d 1303, 1312 (8th Cir. 1977); *Lairsey v. Advance Abrasives Co.,* 542 F.2d 928, 930 (5th Cir. 1976). Therefore, the Court finds that petitioner's motion for reconsideration must be and is hereby denied.

SO ORDERED this *20th* day of March, 1980, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
UNITED STATES DISTRICT JUDGE

No. 77-145-CR

STATE OF WISCONSIN : IN SUPREME COURT

Derrell [sic] McMorris,

Plaintiff in Error,

v.

State of Wisconsin,

Defendant in Error.

ERROR to review a judgment and order of the County Court of Racine County: JOHN C. AHLGRIMM, Judge. *AFFIRMED.*

PER CURIAM. Plaintiff in Error was convicted after a jury trial of the crime of robbery, contrary to sec. 943.32 (1) (a), Stats. He was sentenced to an indeterminate term of 5 years in prison. Writs of error were issued in this case to review the judgment of conviction and an order denying Plaintiff in Error's motions for post-conviction relief. The evidence against the Plaintiff in Error consisted of the testimony of James Krewal, the victim who identified the Plaintiff in Error as the person who grabbed him from behind and robbed him of $36 which was in his wallet. This occurred at 6:00 p.m. on November 14, 1975 in the city of Racine. The victim testified that at the time of the attack he was pushed to the ground and the Plaintiff in Error left the scene. The Plaintiff in Error denied committing the robbery. After the jury's verdict was received and the judgment of conviction entered, the Plaintiff in Error made a motion for a new trial, alleging that the procedure had denied him his right of due process of law by refusing to stipulate to the admissibility of exculpatory polygraph evidence. In support of this motion, a polygraph examiner who had conducted a polygraph examination of the Plaintiff in Error testified to a reasonable degree of scientific

certainty that the Plaintiff in Error was truthful when denying his involvement in the robbery of Krewal.

In *Lhost v. State, No. 76-564-CR,* decided herewith, it was found that the prosecutor's refusal to stipulate to the admissibility of a polygraph examination is not a denial of due process of law. The jury had an opportunity to hear the Plaintiff in Error's testimony as well as the victim's and assess the credibility of each. If the examiner's testimony had been admitted, the jury would have had to assess the examiner's credibility in order to determine the weight to be given to his conclusion that the Plaintiff in Error was truthful. The prosecutor was entitled to make a good faith determination that a collateral issue of this nature should not be presented to the jury. In this case the prosecutor had not agreed to stipulate to this examination nor had the court approved a lie detector stipulation before trial. Therefore, the trial court properly refused to admit the testimony of the examiner under *State v. Stanislawski,* 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

The judgment and order are affirmed.

Opposition

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1981

Case No. 81-189

THOMAS ISRAEL and
BRONSON C. LA FOLLETTE,

Petitioners,

v.

DARREL McMORRIS,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES BENNETT VETZNER

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IN THE SUPREME COURT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Is it a violation of due process for a Wisconsin prosecutor to refuse to stipulate to admission of the results of a polygraph examination of a state criminal defendant when: 1) the prosecutor's decision is based solely on tactical considerations; 2) the state court trial judge concluded that the polygraph evidence was reliable and critical to the defense but was inadmissible solely because of the prosecutor's refusal to stipulate; and 3) under Wisconsin's unique procedure, the signing of a stipulation would not have necessarily resulted in admission of the polygraph evidence, but would have merely permitted the judge to decide the issue after an evidentiary hearing at which either party could oppose admission of polygraph evidence, notwithstanding execution of a prior stipulation?

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SUPPLEMENTAL STATEMENT OF FACTS

Petitioners, in their exuberance to convince this court of the merit in their position, have submitted argument in their Statement of the Case. For example, petitioners stated as fact that, as a result of the decision in the court below, "there is virtually nothing left of the stipulation requirements." Petition for Certiorari 11. Respondent would, of course, object to such assertions being treated as fact. Except for such instances, which should be readily discernible to this court, respondent does not disagree with petitioners' recitation of the facts and would only supplement the statement in two respects.

First, petitioners have failed to adequately set forth the reasoning of the Wisconsin trial court when it refused to grant a new trial on the basis of excluded polygraph evidence. Upon reviewing the evidence, the trial judge found that the polygraph testimony is a reliable form of evidence:

> The Court received the expert testimony of Mr. Theodore G. Welch concerning the use and tests of the polygraph. Reports and studies pertaining to the reliability of the polygraph have been filed with the Court.
>
> The Court has been familiar with the polygraph in judicial proceedings since 1962. During this period of time as a juvenile judge for approximately ten years and a criminal judge for approximately two years, this Court has been familiar with the testing and reliability of the polygraph and is convinced that the polygraph is a reliable form of evidence and should be considered along with the other evidence without the requirement of stipulation.
>
> The time has now arrived for the Wisconsin Supreme Court to re-evaluate the evidentiary value of the polygraph. Consideration should be given to the use of the polygraph test as evidence similar to the use of blood tests as evidence, as provided in Wisconsin Statute 52.36.

Exhibit E at 3 to Petitioners' Answer (Docket Entry No. 3).

The court also concluded polygraph testimony, if admitted, would have been an important piece of evidence for the jury:

> The entire testimony of the state was composed of testimony from the eye witness (sic) victim. The defendant denied the allegations and claimed that he was not the actor. Therefore, the question of guilt revolved upon "identity" of the defendant by the victim. The admissibility of the polygraph examination would be an important piece of evidence for the jury to consider and weigh in arriving at its verdict.

Id. at 11.

However, the trial court reluctantly denied petitioner's post-conviction motion on the basis of prior Wisconsin Supreme Court decisions:

> I do not believe that by virtue of the decisions of the Wisconsin Supreme Court, that I have the legal authority to grant the motion of the defendant. However, in denying the motion of the defendant, I believe that this matter should be reviewed by the Wisconsin Supreme Court with consideration given in the light of today's knowledge in reviewing and revising the law to admit the polygraph test as a form of evidence in criminal proceedings.

Id.

Second, in light of petitioners' decision to discuss waiver, Petition for Certiorari 7-8, it should be noted that in their answer in the petition for writ of habeas corpus, the petitioners expressly stated that the merits of petitioner could be reached because respondent had exhausted his state court remedies. Petitioners' Answer, supra, at p. 3, para. 2.

ARGUMENT

I. THE PRESENT CASE IS AN INAPPROPRIATE VEHICLE FOR CONSIDERATION OF CONSTITUTIONAL IMPLICATIONS OF POLYGRAPH EVIDENCE.

Respondent would agree with petitioners' contention that it would be desirable for this court to scrutinize the constitutional implications of various limitations on the utilization of polygraph evidence. However, respondent would further suggest that the

decision of the court below is simply the wrong case at the wrong time to use as a vehicle for consideration of the constitutional implications of special evidentiary rules for polygraph testimony.

First, it must be considered that, whatever consequences the decision of the court below would otherwise have had on Wisconsin procedure, they have been eliminated by the state court's very recent decision in State v. Dean, 103 Wis.2d 228, 307 N.W.2d 628 (1981). The court below merely held that, consistent with the Wisconsin rationale for admission of polygraph evidence, a prosecutor must have legitimate reasons for exercising a per se exclusion of such testimony. The Wisconsin court went much further, holding that polygraph evidence will henceforth be inadmissible, regardless of whether the parties do or do not stipulate to its usage.

Petitioners, recognizing the potential adverse effect of the Dean decision on their argument here, claim that the state court reached its decision only as a subterfuge to evade the force of the holding in McMorris. While that may well be so, it would seem that the appropriate action for petitioner would be to seek review in this court of the Wisconsin Supreme Court decision in Dean. This has not been done, primarily because petitioners achieved precisely the desired result in the Dean case. As the Wisconsin Supreme Court decision noted, the Wisconsin Attorney General took a position in Dean, as it had in previous cases, that the stipulation rule should be eliminated and polygraph evidence made inadmissible. 103 Wis.2d at 232, 307 N.W.2d at 631. This puts petitioners in an unusual situation, to say the least. In this court, petitioners are arguing that the decision of the court below should be reviewed because it triggered an improvident termination of Wisconsin's experimentation with admission of polygraph evidence. Yet, at the

same time, petitioner LaFollette, as the chief law enforcement official in the State of Wisconsin, successfully argued that experimentation with the polygraph should cease and test results should be inadmissible per se.

Petitioners also argue that, even if the decision of the court below is of no particular consequence in Wisconsin, it may well have national ramifications. However, that assertion ignores the language in the decision which emphasizes that the result "is closely linked to the peculiarities of the Wisconsin stipulation rule." App. 15a. While the limitations in the rationale for the decision may have been lost on petitioner, they were readily observed by other, more neutral observers. The decision in McMorris was found to be of sufficient interest to merit reporting in the Criminal Law Reporter, a periodical summarizing recent decisions affecting the administration of criminal justice. Nevertheless, the editors of this publication clearly warned its readers that the case appeared to be of limited application. Its "headline" or caption for the discussion stated:

> Prosecutor must explain why he won't agree to admission of polygraph data.
> CA7's holding tied to peculiarities of Wisconsin law, facts of this case.

29 Cr.L. 2008 (Bureau of National Affairs, April 1, 1981). The first sentence of the Criminal Law Reporter's summary continued to point out the limited scope of the decision:

> Stressing that its ruling is very narrow, the U.S. Court of Appeals for the Seventh Circuit holds that a habeas petitioner may have been denied due process by a Wisconsin prosecutor's refusal to stipulate to the admission of polygraph evidence.

Id.

Petitioners argue that the Seventh Circuit was incorrect in its conclusion that Wisconsin was not a "consent" state where stipulations serve as a basis to admit what is otherwise inadmissible evidence. See page 8, infra. The key point to consider

here is that, regardless of whether the federal court did or did not err in its analysis, it reached a decision according to reasoning which is not readily applicable in other jurisdictions.

Finally, it should be remembered that the decision of the court below did not conclude that respondent's right to due process was violated or that he was entitled to a new trial. The case was merely remanded for further evidentiary proceedings. In seeking review at the present time, petitioners are essentially asking this court to hold that a state prosecutor can validly refuse to stipulate to a polygraph examination for reasons totally unrelated to the reliability of such testing. With the case in its present posture, further review would essentially require that this possibility be accepted as true. Under these circumstances, respondent submits that it would be far wiser to allow the mandated evidentiary hearing to proceed so that it can be determined whether the prosecutor acted in a proper fashion. If he did so, the petitioner will still prevail in this case without the intervention of this court. On the other hand, if the federal district court concludes that the prosecutor acted in a constitutionally impermissible fashion, petitioners may still seek further review. Indeed, consideration of this case at a later point in time, after factual issues are resolved, may well promote an accurate determination of whether the case is of national significance, as petitioners contend.

II. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH CASES IN OTHER JURISDICTIONS DESIGNED TO ASSURE FAIR ADMINISTRATION OF CRIMINAL JUSTICE.

To consider the accuracy of petitioners' contention that the decision in the instant case is contrary to existing precedent, it is also necessary to understand clearly the scope of the holding in the court below. As petitioners note, respondent has already

conceded that he has no absolute right to present polygraph testimony. Petitioners' Brief 9. Respondent does not retreat from that position now. The focus of the argument advanced previously and of the decision in the court below was on the curious stipulation procedure in Wisconsin through which polygraph evidence could be excluded by the prosecutor. Nevertheless, petitioners assert that Conner v. Auger, 595 F.2d 407 (8th Cir. 1979), confronted the same issue as the court below and reached an opposite result. However, it is readily apparent that the decision in Conner addressed the issue expressly eschewed by respondent: whether prior decisions of this court establish a constitutional right to present polygraph evidence. Indeed, respondent's brief in the court below conceded that the analysis in Conner was correct. However, respondent went on to explain that the Eighth Circuit was analyzing a polygraph stipulation rule far different than the one utilized in Wisconsin prior to the Dean decision.

The Iowa state court holding which preceded the Eighth Circuit's ruling in Conner found its stipulation only policy acceptable because

> [w]hen a party who otherwise has a right to object to the admissibility of evidence consents to the admission of this evidence, he gives up his right to object. This is the principle under which stipulated polygraph evidence is received.

State v. Conner, 241 N.W.2d 447, 459 (Iowa 1976). In contrast to the Iowa law, Wisconsin's stipulation rule,would not have precluded either party from the most vigorous possible efforts to exclude polygraph evidence after the stipulation was signed. While an Iowa stipulation may both enhance reliability by serving to advise the court that the parties find the polygraph test proper and reduce courtroom disputes by eliminating challenges to the test, a Wisconsin stipulation performed neither function. All it did, as the facts in the present case show, was allow the prosecution to

totally exclude critical defense evidence without regard to its reliability or relevancy.

The signing of a Wisconsin stipulation was only a pre-condition to a judicial hearing to determine admissibility of polygraph evidence, at which either party could oppose its admission despite the earlier signing of the stipulation. In the present case, the trial judge believed that the polygraph evidence was reliable and critical to the defense; however, he could not make any final decision as to whether it should be admitted unless the prosecutor first signed a stipulation. Thus, the decision of the court below did little more than foster compliance with the majority rule which holds that admissibility of polygraph evidence is a matter of judicial discretion. See, e.g., United States v. Infelice, 506 F.2d 1358, 1364 (7th Cir. 1974). In Wisconsin, the ultimate decision on admission of polygraph evidence was a matter of judicial discretion, but only if the prosecutor permitted the judge to exercise such. Ironically, petitioners favorably cited Infelice and other cases in urging polygraph testimony to be admitted as a matter of sound judicial discretion because such served the State of Wisconsin's "dual concerns in regard to polygraph testimony -- reliability and the tendency to be accepted as infalible by the jurors. . ." Brief of Petitioners in Seventh Circuit 6.

Petitioners also suggest that the court below was incorrect in its determination that Wisconsin was not a "consent state" in regard to admission of polygraph evidence. It is true that the Wisconsin Supreme Court in Dean disagreed with that conclusion. 103 Wis.2d at 257, 307 N.W.2d at 642. However, a federal court need not show special deference to or presume the correctness of a state court legal analysis comparing its laws with those of other

jurisdictions. Cf. Sumner v. Mata, _____ U.S. _____, 101 S.Ct. 764 (1981).

Of greater significance is the somewhat reluctant conclusion by the state court in Dean that the holding of the court below may have been necessary to prevent prosecutors from misusing their stipulation power:

> In addition to our concern whether the stipulation functions to enhance reliability, we are also concerned, as was the Seventh Circuit Court of Appeals as well as other courts, with the validity of allowing the prosecutor to veto the defendant's wish to introduce polygraph evidence by refusing to execute a stipulation.

103 Wis.2d at 269, 307 N.W.2d at 648. Indeed, the Seventh Circuit's solution, requiring the state prosecutor to give some affirmative statement of the reasons for his decision, is consistent with other Wisconsin cases requiring some affirmative showing in the record that discretion has been fairly exercised. For example, in McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971), the Wisconsin Supreme Court required trial judges to affirmatively state the reasons for the criminal sentences they imposed. The state's public defender agency was required to provide a formal statement of reasons when it exercised its discretion to decline appointment of an attorney in those cases where the right to counsel was not mandatory. State v. Alston, 92 Wis.2d 893, 288 N.W.2d 866 (Ct. App. 1979). Similarly, in State v. Brown, 96 Wis.2d 258, 291 N.W.2d 538 (1980), the Wisconsin Supreme Court developed a procedure whereby prosecutors would be obliged to give advance notice of the additional evidence they were relying on when they chose to reinstitute criminal cases which had been dismissed previously for lack of probable cause. The Brown decision is particularly pertinent to the case at hand, even though it arises in a much different context. There, the court expressed its concern about the possibility of prosecutors reissuing charges

without good cause and thereby harassing defendants. 96 Wis.2d at 266, 291 N.W.2d at 542. It concluded that a procedure whereby the prosecutor would have to articulate the circumstances justifying reissuance would give "the judge an opportunity to assess the reasonableness of the [prosecution's] effort to pursue a second preliminary examination." 96 Wis.2d at 267, 291 N.W.2d at 543. Such reasoning is not unlike the recognition of the court below that a procedure whereby a criminal defendant could require the prosecutor to give reasons for refusing to stipulate to a polygraph examination would deter unwarranted abuse of prosecutorial discretion.

The potential for misuse of the stipulation power is revealed, not only by the circumstances of the present case, but by the recent Wisconsin Supreme Court decision in Robinson v. State, 100 Wis.2d 152, 301 N.W.2d 429 (1981). There, the defendant was charged with several counts of forgery pertaining to a unitary scheme of improperly drawing checks from a single account of another individual. Because the checks were passed in two different counties, charges were brought in both jurisdictions. In one county, the prosecution and defense stipulated to a polygraph examination. When the test results showed the defendant's innocence, the charges were dropped. Even though this information was pertinent to the charges in the other county, the prosecutor there refused to stipulate, and the defendant was convicted by a jury which was unaware of the favorable examination results or the disposition of the related charges in the adjacent county. This situation raises serious questions as to the operation of the pre-Dean polygraph stipulation rule in Wisconsin. If a polygraph test has sufficient reliability to cause the State of Wisconsin to dismiss criminal charges in one prosecution, can it be so lacking

in reliability as to justify total exclusion by the state in a second prosecution? Cf. Green v. Georgia, 442 U.S. 95 (1979). The fact that different prosecutors were involved hardly justifies the result since both operated as arms of the same sovereign. See Santobello v. New York, 404 U.S. 257, 262 (1971). The decision by the court below would not have given the defense a right to present polygraph evidence in the Robinson case. Similarly, the prosecution would not have been precluded from refusing to stipulate. All this decision would have done was open the door to legitimate judicial inquiry as to the reason why the prosecutor in the second county refused to consider polygraph evidence.

Such a limited inquiry is wholly consistent with this court's concern that the adversary process function as a search for the truth, without "a poker game" mentality of its participants. See Williams v. Florida, 399 U.S. 78, 82 (1970). More recently yet, this court made clear that test results which may enhance the reliability of the fact-finding process should not be arbitrarily excluded. Little v. Streater, _____ U.S. _____, 101 S.Ct. 2202 (1981). Respondent does not claim that polygraph tests are as reliable as the blood test in issue in Little. However, despite petitioners' intimations to the contrary, the court below did not establish an unfettered right of criminal defendants to present polygraph evidence. The court below merely held that prosecutors should not have unilateral power to exclude evidence on grounds which have traditionally supported admissibility, i.e., the evidence is both reliable and critical to the defense. In taking a step to insure that the Wisconsin criminal justice system enhances rather that detracts from accuracy in the determination of guilt or innocence, the court below acted consistent with pronouncements of both this court and the Wisconsin Supreme Court itself. Such action is not so controversial as to warrant review in this court.

CONCLUSION

For the above-stated reasons, the petition for writ of certiorari should be denied.

Dated this 28th day of October, 1981.

Respectfully submitted,



CHARLES BENNETT VETZNER

Attorney for Respondent.

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ORIGINAL

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Petitioners,

v.

DARREL McMORRIS,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, by the undersigned attorney, hereby moves to proceed in this Court in forma pauperis pursuant to Rule 46, Rules of the Supreme Court of the United States.

As grounds therefor, the respondent shows to this Court that he was granted leave to proceed in forma pauperis in the United States District Court for the Eastern District of Wisconsin in pursuing a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254, which gave rise to the instant petition in this Court, and that the respondent was found indigent for Wisconsin Public Defender representation in both the state appellate courts and in federal habeas corpus proceedings pursuant to the standards for indigency set forth in Wis. Stat. Ch. 977.

Dated this 28th day of October, 1981.

Respectfully submitted,

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Attorney for Respondent.

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Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS,
OR, IN THE ALTERNATIVE, TO CLARIFY THE DUTIES
OF RESPONDENT'S COUNSEL

The undersigned moves to proceed in forma pauperis and shows the following to the Court:

1. The undersigned is Chief of the Appellate Division of the Wisconsin Public Defender, a statutorily-created state agency which is responsible for providing counsel in Wisconsin criminal appeals for indigents.

2. The Wisconsin Public Defender represented the above-named respondent in his direct appeal in the Wisconsin Supreme Court, and the undersigned attorney personally represented the respondent in the Federal District Court and the Court of Appeals in the federal habeas corpus proceeding in which review is presently being sought in this Court.

3. Such representation was provided because of a determination that the respondent was indigent and lacked sufficient funds to hire his own attorney. Moreover, the respondent was permitted to proceed in forma pauperis in both the Federal District Court and the Court of Appeals.

4. At the present time, the undersigned is unable to locate the respondent for purposes of preparation and submission of a

motion to proceed in forma pauperis in this Court pursuant to Rule 46, Rules of the Supreme Court of the United States.

5. The undersigned believes he has an ethical obligation to continue representing the respondent unless and until he is relieved from doing so by this Court. See Standard 21-3.2(d), ABA Standards, Criminal Appeals (Approved Draft 1978). The undersigned would desire to remain active in this case and believes that, as a result of his familiarity with the issue involved, he is in the best position to set forth reasons why the pending petition should not be granted, or, in the alternative, why the ruling of the court below should be affirmed. However, because the undersigned is not engaged in private practice but is instead a government lawyer who is authorized to represent only those persons who are determined to be indigent, see Wis. Stat. sec. 977.07 (1979-80), he believes there is a substantial question as to the propriety of both providing representation for a client whom the court is unable to certify as indigent and for requiring the Public Defender to assume the cost for printing 40 copies of a response pursuant to Rule 22, Rules of the Supreme Court of the United States.

WHEREFORE, the undersigned requests that this Court permit the respondent to proceed in forma pauperis without submission of a personal affidavit of indigency, or, in the alternative, clarify the continuing responsibilities of the undersigned if this Court is unable to allow respondent to proceed in forma pauperis.

Dated this 9 day of October, 1981.

Respectfully submitted,

Charles Bennett Vetzner

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AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Julie K. Bellefeuille, being first duly sworn on oath, deposes and says that she is employed by the Office of the State Public Defender, 340 West Washington Avenue, Madison, Wisconsin, 53702, and that on October 29, 1981, she deposited a copy of a Brief in Opposition to Petition for Writ of Certiorari, and a Motion to Proceed in Forma Pauperis, in a United States mail box, securely enclosed in an envelope with first-class postage prepaid, and properly addressed to Ms. Kirbie Knutson, Assistant Attorney General, P.O. Box 7857, Madison, Wisconsin, 53707.

Julie K. Bellefeuille
JULIE K. BELLEFEUILLE

Subscribed and sworn to before me
this 29th day of October, 1981.

Notary Public, State of Wisconsin
My commission is permanent.